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Supreme Court, U.S.
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No. 01-75

IN THE

Supreme Court of the United States

PATRICIA E. GENTALA AND ROBERT A. GENTALA,

Petitioners,

vs.

THE CITY OF TUCSON,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The City of Tucson, Arizona, provides city services (sound, lighting, facilities, trash collection, etc.) free of charge to a broad range of community groups for events in city parks, but categorically excludes events with religious messages from eligibility for such free services. Petitioners, organizers of a National Day of Prayer event, brought a constitutional challenge to the city's religious exclusion policy, but a divided en banc Ninth Circuit rejected the challenge.

1. Did the Ninth Circuit err in holding, contrary to this Court's recent decision in *Good News Club v. Milford Central School*, 69 U.S.L.W. 4451 (U.S. June 11, 2001) (No. 99-2036), that a governmental body constitutionally may exclude speech from a limited public forum because of the religious nature of that speech?

2. Did the Ninth Circuit err in holding, in conflict with the D.C. Circuit, that the Establishment Clause of the First Amendment forbids a municipality from providing, on a neutral basis, in-kind services, such as lighting and trash collection, to a religious event in a public park?

3. Does the discriminatory denial of in-kind government services to a speaker solely because of that speaker's religious message violate the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment, as incorporated into the Fourteenth Amendment?

4. Should this Court summarily reverse the Ninth Circuit where that court upheld the categorical exclusion of private speakers with religious messages from a program of in-kind benefits for city park events?

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INTRODUCTION

In this case a city discriminatorily denied Patricia and Robert Gentala access to in-kind benefits (such as lighting and facilities) made available without charge to a broad range of community groups for events in city parks. The sole reason for this categorical discrimination was that the Gentalas' planned event -- the National Day of Prayer -- would have communicated a religious message. The Ninth Circuit's decision upholding the city's religious exclusion policy runs directly contrary to this Court's recent decision in *Good News Club v. Milford Central School*, 69 U.S.L.W. 4451 (U.S. June 11, 2001) (No. 99-2036), as well as *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), and the other decisions in this Court's line of "equal access" precedents. Indeed, this Court in *Good News Club* cited the Ninth Circuit's en banc decision in the *Gentala* case as belonging to one side (the wrong side) of a conflict in the circuits, a conflict this Court undertook to resolve in *Good News Club*. 69 U.S.L.W. at 4453.

This Court should grant review and summarily reverse or, in the alternative, either vacate the decision below and remand for further consideration in light of *Good News Club*, or else simply grant plenary review.

DECISIONS BELOW

The en banc opinion of the U.S. Court of Appeals for the Ninth Circuit is reported at 244 F.3d 1065 (9th Cir. 2001) (App. A). The previous panel decision of the Ninth Circuit is reported at 213 F.3d 1055 (9th Cir. 2000) (App. D). The order granting en banc review is reported at 222 F.3d 614 (9th Cir. 2000) (en banc) (App. E). The remaining orders and opinions below are unreported.

JURISDICTION

The U.S. Court of Appeals for the Ninth Circuit rendered its en banc decision on March 30, 2001. On June 4, 2001, Justice O'Connor extended the deadline for filing a petition for a writ of certiorari until July 12, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND POLICIES

The text of the First and Fourteenth Amendments to the United States Constitution are set forth in Appendix F. The pertinent city policy is set forth in Appendix G.

STATEMENT OF THE CASE

Facts[1]

The City of Tucson authorizes the provision, free of charge, of basic city services -- lighting, trash collection, use of facilities like bandshells and stage equipment, etc. -- to nonprofit organizations holding events in public parks. The city, however, categorically denies such in-kind benefits -- and instead requires payment of fees -- for events with a religious message. The constitutionality of that categorical discrimination is at issue here.

1. The Tucson Civic Event Policy

Municipal parks in Tucson, Arizona, are open for use, by members of the public, for a wide range of expressive activities, including public rallies. Park users can obtain, for a fee, a variety of city services (facilities, equipment, and the labor of city workers) for their events. Park users must coordinate with the city regarding such services.

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[1]As the district court noted, App. 77a, the critical facts are undisputed.

Pursuant to a Civic Event Policy that the respondent City of Tucson has maintained since at least October of 1992, park users can apply for a waiver of city fees for most services. The Civic Event Policy declares that the Tucson Mayor and City Council encourage and support civic events that:

- Celebrate and commemorate the historical, cultural and ethnic heritage of the City and the nation, or increase the community's knowledge and understanding of critical issues, with the purpose of improving citizens' quality of life;
- generate broad community appeal and participation;
- instill civic pride in the City, state or nation;
- contribute to tourism; or
- are identified as unique community events.

App. 162a. In furtherance of this policy, the Mayor and Council "annually authorize the provision of various City services to Civic Events, at no charge." *Id.*

The Civic Event Policy specifically forbids direct city funding of events, or even indirect funding by reimbursement of third-party contractors: "City support provided through the Civic Event process will not involve cash payments to events, or to contractors necessary to provide a requested service." App. 162a-163a. Instead, the City simply charges off against a Civic Event Fund those city services -- trash collection, facilities rental, fees for light and audio equipment -- which would otherwise have been billed to the event sponsors. Bilsens Aff. ¶ 8. Thus, "Civic Event allocations are a budgetary means of detailing" what is in effect a waiver of fees for services. App. 162a.

The Tucson city policy also limits the in-kind provision of services to those "typical" of park events:

> In-kind City services provided through the Civic Event Funding Process will be limited to typical event-related services (e.g., Parks event equipment, refuse containers, street sweeping). Non-typical services (e.g., transportation of event materials, on-site City staff to conduct parking lot control or other miscellaneous duties) will not be provided to events.

App. 164a.

To be eligible for free in-kind city services, events must be open to the public. App. 163a. Events must also be sponsored either by a nonprofit organization or by one or more individuals conducting the events on a nonprofit basis. *Id.*

The city uses evaluation criteria to review applications for in-kind services. In addition to examining the event sponsor's financial need and other sources of funding for the event, App. 166a, the city considers the following:

> **Purposes and Objectives**: The extent to which the event celebrates and commemorates the community's cultural and ethnic composition, or significant ethnic, cultural and historical national or local occurrences; or improves understanding and awareness of issues facing the community with the objective of improving the quality of life. As additional funds are available, other types of events will be considered for support, but sponsors of such events must demonstrate, through a description of the event and its goals and objectives, that the event is worthy of City support.
>
> **Community Interest**: The extent to which the event generates broad community appeal and participation. The scope of community appeal and participation will be determined by the projected event attendance (or actual attendance at the event's last occurrence), in comparison to

> similar information from other events requesting City support. However, special consideration will also be given to small first time events conducted by organizations with limited resources that are in special need of assistance in their initial efforts to establish an event.

App. 165a-166a.

For the 1994-95 fiscal year, the City of Tucson allocated over $65,000 worth of in-kind services, under its Civic Event Policy, for two dozen events including:

- Hispanic Cultural Arts Event
- Earthday Festival
- Miracle on 31st Street
- Gay Pride Picnic
- San Xavier Week Pow Wow
- Fiesta de Garibaldi
- St. Patrick's Day Parade and Festival

The city's Civic Event Subcommittee, which initially reviews applications,[2] recommended renewed provision of in-kind services in 1995-96 for all but one[3] of the events provided such services in the previous year.

Only one class of events is categorically excluded, under the Tucson Civic Event Policy, from eligibility for free in-kind services under the policy: "events held in direct support of

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[2]The full city council retains authority to review subcommittee action on applications for in-kind services, Bilsens Aff. ¶¶ 10-11, although subcommittee approval of smaller grants (those under $1,500) need not be referred to the full council, *id.* ¶ 10.

[3]The Sister Cities Fund Raiser was not recommended for renewal. In addition, one new event (Casa Car Show) was not approved, and one event rejected in 1995-96 (Humane Society Fun Day) was again rejected.

religious organizations." App. 163a. This categorical exclusion targets two kinds of events: fundraisers for religious organizations, and events with religious messages. Transcript of Hearing on Motion for Preliminary Injunction [Prel. Inj. Tr.] at 42-43 (D. Ariz. Aug. 8, 1997) (counsel for Tucson explaining the "two ways" an event can directly support religious organizations, in violation of the Civic Event Policy). The Tucson policy explicitly allows for in-kind city services to fundraising events for other nonprofits. App. 163a, 166a. Only fundraisers for *religious* organizations are automatically disqualified under the policy. Likewise, events with nonreligious messages are eligible for in-kind city services. App. 162a, 165a. Only events with *religious* messages are automatically disqualified under the policy.

2. Denial of the Gentalas' Application

On April 16, 1997, petitioner Patricia Gentala submitted an application for in-kind city services for the National Day of Prayer (NDP) to be held on May 1, 1997. App. 135a-159a. Mrs. Gentala applied on behalf of herself and as Chairperson and City Coordinator of the Tucson National Day of Prayer Committee (NDP Committee).[4]

In her application, Mrs. Gentala explained that the NDP event would be cosponsored by the NDP Committee and the Tucson Association of Evangelicals. App. 135a. The event would be free and open to the public. App. 139a. Mrs. Gentala described the planned event as follows:

> The event will be hosted by a local radio announcer. There will be a time of praise and worship led by both a youth

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[4]Mrs. Gentala's husband, petitioner Robert Gentala, was actively involved with his wife in the leadership of National Day of Prayer activities.

choir and an adult choir. Pastors from nine different churches will lead the participants in prayer for local, state and national issues including the following:

- Improved relationships between different segments of our society.
- National, state and local leaders and their specific prayer requests.
- Law enforcement and emergency services.
- Youth, families, neighborhoods and the homeless.
- Educators and schools.

Patriotism will be emphasized in the decorations and music.

App. 141a. Mrs. Gentala reported that some 700 people attended the last prior NDP event and that she anticipated 700-900 attendees at the upcoming NDP. App. 142a.

In her application, Mrs. Gentala requested the use of the bandshell stage and the use of sound and lighting equipment. App. 153a-154a. The fee waiver sought had a total value of $340. App. 142a, 153a-154a. Mrs. Gentala explained that it is "difficult for us to afford adequate sound equipment, lighting, and rental fees" and that in previous years the NDP suffered from an "inadequate stage and sound package." App. 144a.

The city issued permits for the NDP event at the city's Reid Park, in the bandshell area (Demeester Outdoor Performance Center). The city denied, however, Mrs. Gentala's request for in-kind services under the Civic Event Policy.

Mrs. Gentala's request for in-kind services went initially before the Civic Event Subcommittee of the Tucson City Council. On April 21, that subcommittee voted to reject the request. The subcommittee chairman stated that the request

was against city policy and "separation of church and state," adding, "We're not gonna get into prayer stuff."[5]

The NDP event went forward without the provision of free in-kind services, with some 1,000 people attending. The NDP Committee rented the band shell for $130, but could not afford the additional sound and lighting equipment desired.[6]

Mrs. Gentala and her husband, petitioner Robert Gentala, then brought the matter before the full city council. The Gentalas formally requested the city to reconsider its religious exclusion, under the Civic Event Policy, for future NDP events. At a council meeting, the Mayor stated that "the question of church and state is what we're talking about, and I think you understand that and that was why there was that type of rejection."[7] The city then sent a formal rejection letter explaining that the denial was "because the National Day of Prayer is an event that supports a religious organization."[8] As counsel for the city subsequently explained, the city rejected the application "in this case" because of the event's "religious message." Prel. Inj. Tr. at 43.

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[5]Verbatim Transcript of Civic Event Subcommittee meeting re: "National Day of Prayer" (Apr. 21, 1997).

[6]The NDP event depends exclusively upon donations. All receipts are used to defray costs of the event, with any remaining balance going to the next year's event. No funds collected go to support the NDP Committee itself or any other beneficiary. App. 142a-143a.

[7]Verbatim Transcript of Tucson City Council Meeting (excerpt) at 2-3 (May 12, 1997).

[8]Letter of Ieva Bilsens, Budget Analyst, Dep't of Budget & Research, City of Tucson, to Pat Gentala (May 13, 1997).

Course of Proceedings

Petitioners Patricia and Robert Gentala filed suit under 42 U.S.C. § 1983 in district court in Arizona, challenging the constitutionality of the Civic Event Policy on its face and as applied. The complaint asserted, *inter alia*, violations of the Free Speech, Establishment, and Free Exercise Clauses of the First Amendment and requested declaratory and injunctive relief. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3).

The district court consolidated the hearing on a preliminary injunction with the trial on the merits, denied preliminary and permanent injunctive relief, and dismissed the action. App. 77a.

In its opinion, the district court described the case as "illustrat[ing] the confusing intersection between the First Amendment's Speech Clause and Establishment Clause." App. 57a (footnote omitted). The district court recognized the problematic nature of the city's legal position:

> The City's sole basis for denial of Plaintiffs' application for funding is acknowledged to be the fact that the National Day of Prayer is a religious event, involving religious expression and directly supporting religious groups. Content-based restriction on speech is presumptively unconstitutional.

App. 59a-60a (citation omitted). The district court also admitted that "[t]he facts at hand appear similar to those in *Rosenberger* [*v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995)]," App. 63a, in which this Court held unconstitutional the discriminatory exclusion of a religious publication from a state university program reimbursing printing costs for student publications.

Nevertheless, the district court distinguished *Rosenberger*. App. 63a-65a. The district court opined that the petitioners were seeking "tax dollars to support a religious event," App. 66a, and that the Establishment Clause barred such use of "general tax funds," App. 65a. Hence, compliance with the Establishment Clause supplied the compelling interest needed to justify the city's "content-based restriction on speech." App. 67a.

The district court concluded further that the city's policy of religious exclusion passed muster under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), because the denial of in-kind services to events with religious messages did not express hostility to religion, have a primary effect of inhibiting religion, or foster excessive entanglement with religion. App. 69a-72a. Turning to the endorsement test, the district court noted that the city could "easily advertise that it does not endorse the National Day of Prayer or any event." App. 73a. Nevertheless, the district court found that the presence of city workers at the NDP event would convey a message of endorsement. App. 73a-74a. The court also found that because of the NDP's "implied message" endorsing "Judeo-Christian religion," city support "impermissibly tends to give the religious event the appearance of status in the political community," App. 75a.

Having concluded that the religious exclusion clause of the Civic Event Policy was constitutional, indeed constitutionally mandatory, the district court dismissed the suit. App. 77a.

Petitioners appealed, and a divided panel of the Ninth Circuit reversed. App. D.

Undertaking "to navigate carefully the shoal-infested channel between the Scylla of the First Amendment's Free Speech Clause and the Charybdis of the First Amendment's

Establishment Clause," 213 F.3d at 1060, the panel first observed that

> while the [NDP] event had a strong sectarian character, as a civic event capable of increasing the community's knowledge and understanding of critical issues as well as generating broad community interest, support and civic pride, the event fell within the scope of events for which the [Civic Event] Fund had been created.

Id. at 1061. Further,

> the record shows -- and the City has never contested -- that the application was denied due to the religious character of the event for which the Gentalas were seeking reimbursement.

Id. at 1063.

Applying forum analysis, the panel identified the relevant forum as the Civic Event Fund -- i.e., the program for provision of in-kind city services. *Id.* at 1061-62. The panel concluded that this Fund constituted a "limited public forum that has been opened to support the expressive activities of certain groups speaking about certain topics," *id.* at 1062.

Observing that the religious exclusion clause of the Civic Event Policy rendered certain events "absolutely ineligible" for in-kind benefits under the policy, *id.* at 1063, the panel held that "the Gentalas' application could not be denied merely because it would bring a religious perspective to an otherwise permissible conversation," *id.* at 1064.

> The Gentalas' application was rejected because of their view that the most relevant manner in which to address . . . important social concerns was through the expressive acts of worship, singing and prayer.

Id. at 1065. The panel found its conclusion bolstered by the city's having approved a Civic Event Policy application for the Las Posadas event, which reenacts the search of Mary and Joseph for lodging in Bethlehem prior to the birth of Jesus. *Id.* The city explained that it considered Las Posadas to be "art," not an event "to directly support a religious organization." *Id.* The panel found this distinction -- between religion as "art" and religion as "religion" -- perfectly illustrative of viewpoint discrimination:

> we conclude that distinguishing between those who speak about religion who are directly supporting a religious organization and those who speak about religion who are not will always require the City to discriminate on the basis of the speakers' viewpoint.

Id. at 1065-66.

The panel also concluded that the Establishment Clause did not require or justify the religious exclusion. 213 F.3d at 1066-67 (applying *Lemon* and endorsement tests). The panel explicitly rejected efforts to distinguish *Rosenberger*, 213 F.3d at 1067-70, noting that the "in-kind services made available" under the Civic Event Policy were not "direct money payments to an institution or group that is engaged in religious activity," *id.* at 1069 (internal quotation marks and citation omitted).

The panel concluded that the religious exclusion clause of the Civic Event Policy was unconstitutional on its face and as applied to the Gentalas. *Id.* at 1071. One judge dissented, viewing the case as dealing with constitutionally forbidden taxpayer-funded subsidies of a religious event. *Id.* at 1072-83 (Pregerson, J., dissenting).

At the behest of respondent, the Ninth Circuit granted rehearing en banc. App. E. The en banc court proceeded to

uphold Tucson's religious exclusion policy on the basis that the Establishment Clause required such an exclusion. App. A.

The en banc Ninth Circuit acknowledged that, under the Civic Event Policy, the city merely provides in-kind benefits, not direct monetary support, to event sponsors. 244 F.3d at 1069. The en banc court further acknowledged that "there were sufficient funds available that most non-profit groups sponsoring eligible events received funding if they asked for it," *id.*, and that the city was "providing in-kind services for a wide range of speakers," *id.* at 1073. The en banc court recognized as well that the *Rosenberger* case was "indeed quite similar to this one in many respects," *id.* at 1074.

Nevertheless, the en banc court concluded that the Establishment Clause required the categorical exclusion of religious speakers from the Civic Event program, *id.* at 1078, 1082, "even if the exclusion is viewpoint discriminatory," *id.* at 1073 n.12.

The en banc court devoted considerable effort to distinguishing *Rosenberger*, 244 F.3d at 1074-81, ultimately concluding that "significant factual differences" supported "Tucson's Establishment Clause justification for its religious organization exclusion," *id.* at 1078.

Turning to petitioner's Free Exercise claim, the en banc court held that the discriminatory exclusion of religious events from in-kind benefits had not "discernibly burdened" the Gentalas or denied them services "essential to survival in civil society," 244 F.3d at 1082.

Dissenting, Judge Fernandez perceived the Tucson religious exclusion clause as "outright discrimination," *id.* at 1082, "aimed directly at religious organizations as such," *id.* at 1084, in violation of the Free Exercise Clause.

> The City has done something very like denying police and fire protection to churches. It has allowed all other non-profit organizations (except those that it already subsidizes) to cross the threshold that gives them the possibility of participation in a fund which allows the use of city facilities and services at no additional cost, but it has excluded religious organizations from those benefits. It is as if the City charged religious organizations, and only religious organizations, when firemen or policemen came to their facilities, or for the repair of sidewalks, or for the use or cleaning of roadways. That cannot be and is not constitutional.

Id. at 1085. In a separate dissent, Judge Kleinfeld, joined by Judge Wardlaw, contended that the record was insufficient to decide the Establishment Clause question. *Id.* at 1086-88. Echoing Judge Fernandez, these dissenters noted that

> [m]aking religious groups pay for what everyone else gets for free is like charging the churches but no one else when they call for police or fire department assistance.

Id. at 1087 (footnote omitted).

REASONS FOR GRANTING THE WRIT

Petitioners do not contend that the city *must* afford them free in-kind support. But the *a priori* disqualification of the Gentalas from even entering the review process, based solely on the religious perspective of their message, is indefensible under this Court's precedents.

> More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.

Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 839 (1995). This Court recently reaffirmed this well-settled jurisprudence in *Good News Club v. Milford Central School*, 69 U.S.L.W. 4451, 4455 (U.S. June 11, 2001) (No. 99-2036):

> [S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the grounds that the subject is discussed from a religious viewpoint.

Despite this Court's long line of cases protecting equal access for religious speech, however, the en banc Ninth Circuit held that the Establishment Clause *required* the discriminatory exclusion of petitioners' planned National Day of Prayer program from the provision of free city services *even if that exclusion was viewpoint-based.* 244 F.3d at 1073 n.12. This Court should summarily reverse or, in the alternative, either vacate the decision below and remand for further proceedings in light of *Good News*, or simply grant plenary review.

I. *GOOD NEWS CLUB* DIRECTLY UNDERCUTS THE DECISION OF THE NINTH CIRCUIT.

The recent decision of this Court in *Good News Club* repudiates the Ninth Circuit's decision below, warranting reversal in light of *Good News Club*.

First, this Court expressly repudiated the Ninth Circuit's ruling in the present case -- *Gentala* -- in *Good News Club*. This Court identified *Gentala* as being part of a conflict in the circuits, a conflict this Court undertook to resolve in *Good News Club*:

> There is a conflict among the Courts of Appeals on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech. Compare *Gentala v. Tucson*, 244 F.3d 1065 (CA9

> 2001 (en banc) (holding that a city properly refused National Day of Prayer organizers' application to the city's civic events fund for coverage of costs for city services); *Campbell v. St. Tammany's School Bd.*, 206 F.3d 482 (CA5 2000) (holding that a school's policy against permitting religious instruction in its limited public forum did not constitute viewpoint discrimination), cert. pending, No. 00-1194; *Bronx Household of Faith v. Community School Dist. No. 10*, 127 F.3d 207 (CA2 1997) (concluding that a ban on religious services and instruction in the limited public forum was constitutional), with *Church on the Rock v. Albuquerque*, 84 F.3d 1273 (CA10 1996) (holding that a city's denial of permission to show the film Jesus in a senior center was unconstitutional viewpoint discrimination); and *Good News/Good Sports Club v. School Dist. of Ladue*, 28 F.3d 1501 (CA8 1994) (holding unconstitutional a school use policy that prohibited Good News Club from meeting during times when the Boy Scouts could meet). We granted certiorari to resolve this conflict.

69 U.S.L.W. at 4453. By then holding that the exclusion of speech from a limited public forum "on the basis of the religious nature of the speech," *id.*, "constitutes impermissible viewpoint discrimination," *id.* at 4455, this Court resolved the conflict in the circuits *against* the decisions in *Gentala*, *Campbell*,[9] and *Bronx*.

Second, this Court in *Good News Club* cautioned that, while Establishment Clause concerns in theory may justify *content-*

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[9]Not surprisingly, a week later this Court granted review in *Campbell*, vacated the decision below, and remanded for further consideration in light of *Good News Club*. *See Campbell v. St. Tammany Parish School Board*, 69 U.S.L.W. 3778 (U.S. June 18, 2001) (No. 00-1194).

based restrictions on speech, it is unclear "whether a State's interest in avoiding an Establishment Clause violation would justify *viewpoint* discrimination." 69 U.S.L.W. at 4455 (emphasis added). *See also id.* at 4458. The Ninth Circuit, by contrast, mistakenly believed that this Court had already "indicated repeatedly" that an "Establishment Clause justification would suffice even if the exclusion is viewpoint discriminatory," 244 F.3d at 1073 & n.12.

Third, in *Good News Club* this Court held that a neutral policy of equal access is presumptively constitutional:

> [T]he guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. . . . The Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups. *Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club.*

69 U.S.L.W. at 4456 (citation omitted, emphasis added). The Ninth Circuit, by contrast, discounted the significance of neutrality, 244 F.3d at 1075-76, and gave no indication that respondent Tucson would need to wage an "uphill battle" to justify the discriminatory exclusion of religious speakers from its provision of free in-kind services.

Third, in *Good News Club* this Court recognized "the danger that [observers] would perceive a hostility toward the religious viewpoint if the [religious speaker] were excluded from the public forum." 69 U.S.L.W. at 4457. "Any bystander could

conceivably be aware of the [government's] use policy and its exclusion of the [religious speaker], and could suffer . . . from viewpoint discrimination," *id.* The Ninth Circuit gave no consideration whatsoever to these "countervailing concerns related to rights of other individuals in the community," *id.*

In sum, this Court's ruling in *Good News Club* mandates reversal of the Ninth Circuit's en banc decision in *Gentala*.

II. THE DECISION OF THE NINTH CIRCUIT CONFLICTS SQUARELY WITH THE DECISIONS OF THIS COURT.

The Ninth Circuit has condoned the categorical, discriminatory exclusion of petitioners' intended event from a city program of in-kind services because of the event's religious message. The incompatibility of this ruling with the precedents of this Court could scarcely be clearer. The ruling below flies in the face of this Court's free speech, free exercise, and establishment jurisprudence.

A. The Free Speech Clause

The First Amendment protects religious speech, including prayer and worship. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (and cases cited).

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be *Hamlet* without the prince. Accordingly, *we have not excluded from free-speech protections religious proselytizing . . . or even acts of worship.*

Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (citations omitted) (emphasis added in part). The Free Speech Clause therefore precludes discrimination

against religious speech. *Id.* at 761 (strict scrutiny applies where expression was rejected "precisely because its content was religious"). Indeed, such discrimination constitutes viewpoint discrimination. *Good News Club*, 69 U.S.L.W. at 4454-55; *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993); *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1995) ("discriminating against religious speech was discriminating on the basis of viewpoint"). Viewpoint-based discrimination -- an egregious form of content-based censorship, *Rosenberger*, 515 U.S. at 829 -- violates the right to free speech even in nonpublic fora. *See Lamb's Chapel*, 508 U.S. at 390-92; *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985) ("government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"). Hence, no forum analysis is necessary to invalidate such censorship. *Lamb's Chapel*, 508 U.S. at 391-92.

In the present case, the respondent city excluded the petitioners' otherwise eligible expressive activities solely because the use would entail a forbidden perspective -- that of a believer supplicating God. This is unconstitutional viewpoint discrimination, yet the Ninth Circuit upheld the exclusion.

B. The Free Exercise Clause

The Free Exercise Clause forbids the discriminatory restriction of religious activities. Such a restriction targets speech or conduct *because it is religious* and thus strikes at the very heart of the constitutional protection of religious freedom. *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) ("The government may not . . . impose special disabilities on the basis of religious views or religious status" or ban acts "only because of the religious belief that they display").

> [T]he minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532-33 (1993). *See also McDaniel v. Paty*, 435 U.S. 618 (1978).

In the present case, the city categorically excludes events with religious messages from its program of free in-kind services. The component activities -- gathering, singing, speaking, celebrating, and so forth -- are not otherwise objectionable uses. Just as in *Lukumi*, the government could not constitutionally forbid only *religious* slaughter of animals, so here the city cannot categorically disqualify only events with *religious* messages. Yet the Ninth Circuit condoned the city's targeted exclusion of religious speech.

The Ninth Circuit labeled petitioners' Free Exercise claim "weak" because the city had not imposed an "outright prohibition" of religious practice or denied services "essential to survival in a civil society," 244 F.3d at 1082. But as discussed above, this is *not* the test for reviewing *facially discriminatory* laws. Were the Ninth Circuit's miserly test correct, one would be hard pressed to challenge such plainly noxious laws as a ban on clergy attending Fourth of July events, or the categorical exclusion of church vehicles from HOV lanes.

C. The Establishment Clause

The Establishment Clause requires neutrality and forbids hostility toward religion. As this Court has often explained, the Establishment Clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers;

it does not require the state to be their adversary." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). *Accord Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (Establishment Clause forbids government action with an effect that "inhibits religion"). The discriminatory suppression of religious activities "would demonstrate not neutrality but hostility toward religion." *Board of Educ. v. Mergens*, 496 U.S. 226, 248 (1990). *Accord Rosenberger*, 515 U.S. at 844-46; *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in judgment).

Moreover, discriminatory suppression of religious speech requires the censor to judge what is and is not religious. This creates additional constitutional problems of "entanglement":

> [city officials] would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion. . . . There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

Widmar, 454 U.S. at 272 n.11 (internal quotation marks and citations omitted). *Accord Rosenberger*, 515 U.S. at 844-45. Thus, treating religious expression on equal terms with secular expression "would in fact *avoid* entanglement with religion," *Mergens*, 496 U.S. at 248 (emphasis in original; citation omitted).

Here the city discriminates against precisely those activities which it deems to have a "religious message," regardless of whether the intended use would otherwise be eligible for in-kind benefits. Petitioners' request, for example, was -- in secular terms -- to hold a meeting for purposes of discussion and petition regarding social, political, and educational matters.

The city categorically denied access to its program of in-kind services for this otherwise eligible use because the speech of participants would include a religious message. This is the antithesis of neutrality. Moreover, the policy at issue requires government officials to identify "religious" messages by private groups in order to enforce the policy of exclusion. Government agents are thus compelled to classify the activities of private citizens according to their perceived religiosity. Even if such a task were workable -- and it is not -- it would be a wholly improper role for a government censor. *Widmar*, 454 U.S. at 269 n.6, 272 n.11.

III. THE DECISION BELOW IS INDEFENSIBLE IN LIGHT OF *GOOD NEWS CLUB*, *ROSENBERGER*, AND OTHER DECISIONS OF THIS COURT.

The Ninth Circuit offered a potpourri of reasons for not following this Court's line of equal access cases in the present litigation. None of the lower court's proffered reasons, however, withstands scrutiny.

A. The Ninth Circuit's Specious Distinction of *Rosenberger*

After admitting that this Court's *Rosenberger* case was "quite similar to this one in many respects," 244 F.3d at 1074, the Ninth Circuit nevertheless attempted to identify reasons not to follow *Rosenberger*'s result. As demonstrated below, these purported distinctions are patently meritless.

1. Source of revenue

The Ninth Circuit noted that "the source of the Civic Events Fund moneys includes general tax revenue," 244 F.3d at 1078, unlike the student fees in *Rosenberger*. But this ought not to have altered the result.

First, none of the revenue in question here goes directly to any religious speaker; instead, the city provides only in-kind services. As in *Rosenberger*, "[w]e do not confront a case where . . . the government is making direct money payments to an institution or group that is engaged in religious activity," 515 U.S. at 842.

Second, *Rosenberger* distinguished "an expenditure from a general tax fund," *id.* at 841, on grounds equally applicable here -- namely, that the in-kind benefits drew upon "a special fund" set aside, not "for unlimited purposes," but for purposes of facilitating the expressive activities of private parties, *id.* As in *Rosenberger*, "[t]he error made by the Court of Appeals . . . lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient." *Id.* at 843.

Third, there is simply no support in this Court's precedents for holding that the Establishment Clause forbids a government from affording in-kind services on a religious-neutral basis, regardless of the source of funding for those services. "If the Establishment Clause barred extension of general benefits to religious groups, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Widmar*, 454 U.S. at 274-75.

2. Religious organizations

The Ninth Circuit noted that the sponsoring organizations here were religious in nature, 244 F.3d at 1078, while the student publication in *Rosenberger* was "not a religious institution" either in the "usual sense" or under the university's regulation, 515 U.S. at 819. But this was no more than an "additional reason," *id.*, for the *Rosenberger* Court, to distinguish the hypothetical case of a state paying a church's

bills, *id.* The *Rosenberger* Court pointedly noted that, "[e]ven assuming that [the student publication] is no different from a church and that its speech is the same as . . . religious exercises," *id.* at 842, there was no Establishment violation. Indeed, this Court has upheld the norm of equal access when the user was a church. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).

3. Participatory religious service

The Ninth Circuit discerned significance in the fact that the evangelistic student magazine in *Rosenberger* did not "'*practice a devotion* to an acknowledged ultimate reality or deity,'" 244 F.3d at 1078 (quoting *Rosenberger*, 515 U.S. at 840) (emphasis added by Ninth Circuit). But the student group this Court held entitled to equal access in *Widmar* engaged in religious worship. 454 U.S. at 265 n.2. *Widmar* expressly rejected the contention that this fact could justify excluding the proposed use. *Id.* at 269 n.6. This Court's *Good News Club* decision likewise holds that a speaker enjoys the same equal access rights regardless of whether the intended speech can be labeled a religious service. 69 U.S.L.W. at 4455 & n.4.

4. Discretionary decisionmaking

The Ninth Circuit asserted that the city here has "considerably more discretionary decisionmaking [authority] than did the [*Rosenberger*] university's administration," 244 F.3d at 1079. As a factual matter, this is inaccurate. *Compare Rosenberger*, 515 U.S. at 825 (118 of 135 applicants received funding) *with Gentala*, 244 F.3d at 1069 (23 of 26 applicants received in-kind services). *Compare also Rosenberger*, 515 U.S. at 824 (open-ended criterion of "educational purpose" governing review of applications) *with* App. 165a-166a (Tucson Civic Event Fund guidelines). And as a legal matter,

the discretion in question is irrelevant. The existence of religion-*neutral* criteria for assessing applications cannot justify the addition of religiously *discriminatory* criteria. Even in the context of entirely discretionary government arts funding, for example, the categorical exclusion of art with a religious message would obviously trigger grave constitutional difficulties. *See National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998). *A fortiori*, the categorical viewpoint-based exclusion of religious perspectives from a program, like the one here, designed "to encourage a diversity of views from private speakers," *Rosenberger*, 515 U.S. at 834, cannot find refuge in the existence of other, religion-neutral criteria for assessing applications for in-kind support.

5. Fundraising

The Ninth Circuit found significant the fact that the city's religious exclusion clause primarily operates to exclude fundraisers for religious organizations,[10] opining that in-kind support would indirectly allow event sponsors to devote "other, nonearmarked funds" raised at the event to their religious organization. 244 F.3d at 1079. But this is no more than a restatement of the long-discredited "free-up" argument:

> The Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.

Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646, 658 (1980) (internal quotation marks and citations omitted); *see also id.* at 658 n.6 (citing additional authorities). Furthermore, concern about fundraising events is

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[10]Fundraisers for *nonreligious* beneficiaries, however, are eligible for in-kind services under the Civic Event Policy. App. 163a, 166a.

irrelevant on the facts here. The National Day of Prayer was not a fundraiser for the event sponsors; rather, the free will offering taken at the event, App. 139a, was to defray *the event itself*. *See* App. 142a (no money to go to any beneficiary); *id.* at 143a (any fund balance to be used for next year's event). Nor did the city deny the Gentalas' application because it was supposedly a fundraiser. Rather, the city objected to the *religious message* of the event. *Supra* pp. 7-8.

6. Visibility of city personnel and equipment

The Ninth Circuit found the "on-site, observable presence of city employees" and the use of city equipment "quite visible to onlookers," in contrast with the "behind-the-scenes payment of bills . . . in *Rosenberger*," to create a perception of impermissible city endorsement of religion. 244 F.3d at 1079. Reliance on these facts is truly mystifying, as the very same employees and equipment would be visibly present were the Gentalas to pay for such services, rather than receive a fee waiver. The issue is not the *presence* of city services, but rather the "behind-the-scenes payment" for them (or not).[11]

7. Encouragement as endorsement

The Ninth Circuit equated the city's *encouragement* of private events through the Civic Event Policy with *endorsement* of those events for Establishment Clause purposes. 244 F.3d at 1079-80. But the program in *Rosenberger* was likewise designed "to encourage private speech," 515 U.S. at 833; *id.* at

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[11]The Ninth Circuit in any event erred in finding legal significance in the "behind-the-scenes" nature of the payments in *Rosenberger*. Under the endorsement inquiry, the relevant observer is deemed aware of the pertinent facts, including those not immediately visible. *See Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in judgment).

834. And as noted above, *supra* § III(A)(4), the discretion entailed in weighing applications for Civic Event support here, which the Ninth Circuit found pertinent to endorsement, 244 F.3d at 1079-80, does not distinguish *Rosenberger*.[12]

B. The Ninth Circuit's Other Reasons for Denying Equal Access

The Ninth Circuit added two final points in defense of the Tucson religious exclusion policy.

First, the court posited that "allowing various religious organizations to compete for funding" would tempt such organizations to "secularize" their events. 244 F.3d at 1080. The Ninth Circuit's reasoning is precisely backwards. It is the *exclusion* of religious viewpoints, not their *inclusion*, that pressures event sponsors to tone down their religiosity.

Second, the Ninth Circuit expressed fear that the city might tend to promote some religious messages over others. 244 F.3d at 1081. But the wholesale categorical exclusion of speakers with religious perspectives is hardly a satisfying response to this concern. Nor is this concern any less valid when the city is empowered to decide what is and is not "religious" for

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[12]The Ninth Circuit also pointed to the city's requirement that event sponsors publicly acknowledge in-kind support from the city. 244 F.3d at 1080. But for endorsement analysis, the relevant observer will already be deemed aware of that support. *Supra* note 11. And as the Ninth Circuit recognized, "[t]o require the City to hide its true relationship to the event would not alter that relationship," 244 F.3d at 1080. There is nothing unconstitutional about full public disclosure in this context.

The Ninth Circuit also relied upon the requirement that event organizers coordinate with a city official, *id.*, but this requirement applies regardless of whether the event receives in-kind support under the Civic Event Policy. *See* App. 137a. Hence, this detail is as irrelevant to the analysis as is the visible presence of city staff and equipment, *supra* § III(A)(6).

purposes of the exclusion. Moreover, this same amorphous concern could be raised whenever a neutral government program of in-kind benefits includes religious participants. This does not mean that the Establishment Clause requires the denial of equal access.

* * *

The Ninth Circuit's analysis consists of a cobbling together of factually irrelevant and legally inadequate excuses for categorically excluding religious speech from the provision of in-kind city benefits. Furthermore, the Ninth Circuit's flawed approach has caused a split in the circuits, as addressed below.

IV. THE DECISION BELOW CREATES A SPLIT IN THE CIRCUITS.

The decision of the Ninth Circuit conflicts with a decision of the District of Columbia Circuit likewise involving the government provision of free in-kind services to a religious event in a public park.[13]

In *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979), the plaintiffs challenged, as a violation of the Establishment Clause, the federal government's provision of extensive in-kind services for a Catholic Mass to be celebrated by the Pope on the National Mall in Washington, D.C. The D.C. Circuit rejected the Establishment Clause claim. *Id.* at 934-37.

In *O'Hair*, the federal government provided considerable in-kind support:

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[13]In addition, as this Court expressly observed in *Good News Club*, the Ninth Circuit's decision in *Gentala* conflicts with several other circuits on "the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech." 69 U.S.L.W. at 4453. This conflict also warrants granting the present petition. *Id.*

> In connection with the outdoor Mass, the [government] is to provide Park Police services for crowd and traffic control, a chain link fence for crowd control, portable water fountains, and some electrical current. The estimated cost of the Park Police service is between $ 100,000 and $ 150,000 and an estimated additional $ 28,450 will be required for the other services.

Id. at 933 (footnote omitted). Government officials also engaged in extensive coordination with church representatives in anticipation of the event. *Id.* The court concluded that making such in-kind services available on a religion-neutral basis did not violate the Establishment Clause. *Id.* at 934-37.

In the present case, by contrast, the Ninth Circuit held that the Establishment Clause *prohibited* making in-kind services available on a religion-neutral basis for events in city parks.

V. THE DECISION BELOW CREATES A DEVICE FOR EVADING AND NULLIFYING THE EQUAL ACCESS RIGHTS OF RELIGIOUS SPEAKERS.

The Ninth Circuit has essentially devised a road map for evading and nullifying this Court's equal access precedents. Under the lower court's rationale, any government body wishing to discriminate against religious users need only: (1) impose user fees for overhead (facilities, lighting, climate control, maintenance), (2) waive those fees for virtually all other users, and (3) assert that the Establishment Clause forbids the waiver of those fees for religious users. By this simple bookkeeping expedient, a school district (as in *Good News Club* and *Lamb's Chapel*), university (as in *Rosenberger* and *Widmar*), or other government body (as in *Capitol Square*) could, if the Ninth Circuit's pernicious ruling were to stand, render nugatory the equal access norm.

CONCLUSION

This Court should grant the petition for certiorari and either summarily reverse the judgment of the Ninth Circuit, or else vacate the judgment below and remand for further consideration in light of *Good News Club*. In the alternative, this Court should grant plenary review.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 97-17062, 97-17069

PATRICIA E. GENTALA and ROBERT A. GENTALA,
Plaintiffs-Appellants-Cross-Appellees,

v.

THE CITY OF TUCSON,
Defendant-Appellee-Cross-Appellant.

Argued and Submitted En Banc
September 19, 2000

Filed March 30, 2001

Before: Mary M. Schroeder, Chief Judge, Ferdinand F. Fernandez, Thomas G. Nelson, Andrew J. Kleinfeld, Barry G. Silverman, Susan P. Graber, M. Margaret McKeown, Kim McLane Wardlaw, William A. Fletcher, Ronald M. Gould, and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Berzon; Dissent by Judge Fernandez; Dissent by Judge Kleinfeld.

BERZON, Circuit Judge:

The pivotal question in this case is whether a city may, using tax funds and public employees, provide stage lighting, sound, and other special-event services for a sectarian religious organization's prayer service held in the bandshell of a public

park. The City of Tucson believed that to do so would violate the Establishment Clause of the First Amendment. For that reason, although Tucson, through its Civic Events Fund ("Fund"), does provide such support to certain events held in public parks, Tucson declined the National Day of Prayer Committee's request that it provide the equipment and services for its National Day of Prayer gathering. We agree with Tucson that although the Establishment Clause remains a "blurred, indistinct and variable barrier" to government support for religious activity, *Lemon v. Kurtzman*, 403 U.S. 602, 614, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971), "the circumstances of [the] particular relationship," *id.*, between Tucson and recipients of Civic Events Fund support is such that Tucson was correct in concluding that the requested funding would have fallen on the Establishment Clause side of that "serpentine" wall. *McCollum v. Board of Educ.*, 333 U.S. 203, 238, 92 L. Ed. 649, 68 S. Ct. 461 (1948) (Jackson, J., concurring). Tucson's decision to refuse Civic Events Fund support to the prayer service's organizers therefore did not run afoul of another First Amendment proscription, against abridging freedom of speech.

Background

I. The Tucson National Day of Prayer Gathering

The Tucson National Day of Prayer Committee ("Prayer Committee") is an organization that, according to its funding application to the City, requires its members to "pledge [a] specific religious belief," namely, Christian, and terminates the membership of any member who does not do so.[1] In the spring

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[1]It is worth noting at the outset that this case does not concern the constitutionality of the Congressionally-established National Day of Prayer.
(continued...)

of 1997, the Prayer Committee organized a National Day of Prayer gathering described in that application as "an annual gathering of Tucson Christians." As planned and as carried out, the event, open to the public, involved "a time of prayer and worship" led by "[p]astors from nine different churches," and two choirs. More than 500 area church congregations were invited to participate in prayers "for local, state and national issues." Contributions were collected from attendees for the purpose of paying for this event and future similar events.

The Prayer Committee chose to hold its National Day of Prayer service in and around a bandshell in Tucson's Reid Park. The organizers applied for and received a permit from the City to use the bandshell, and the event went forward as planned. Tucson in no way prevented the Prayer Committee from holding its prayer service in Reid Park nor interfered with its doing so, instead allowing the Prayer Committee's organizers and members to use the park, as other citizens may do, "for purposes of assembly, communicating thoughts between

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[1](...continued)
Congress first proclaimed such an annual "day" in 1952, as it has issued innumerable other resolutions proclaiming national "days." *See generally* 36 U.S.C. §§ 101-143. It does not appear that there is any federal government funding or support for any National Day of Prayer events; the National Day of Prayer Task Force that promotes participation in the event is a private, nonprofit organization. Nor is the National Day of Prayer in any respect sectarian (although its very point is to favor religion over non-religion). The original congressional resolution, Pub. L. No. 82-324 (1952), the 1988 amendment fixing the first Thursday in May as the National Day of Prayer, Pub. L. No. 100-307 (1988), *codified at* 36 U.S.C. § 119, and the Task Force all stress that the Day is meant as an opportunity for all Americans who wish to do so to pray according to their own faith, not to promote any particular religion or form of religious observance.

citizens, and discussing public questions." *Hague v. Congress of Indus. Orgs.*, 307 U.S. 496, 515, 59 S. Ct. 954, 83 L. Ed. 1423 (1939).[2]

The Prayer Day's organizers, including the appellants here, Patricia and Robert Gentala, were not seeking, however, simply to use the park for their event. They also wanted the City to cover the costs of city-supplied lighting and audio systems. The Prayer Committee applied for free use of $340 worth of such equipment and related services for which the City ordinarily charges a fee, observing that "without help, we will have [an] inadequate stage and sound package, as previous years did."

II. The Tucson Civic Events Fund

The City does fund such equipment and services for some private events held in the City's parks, through a fund denominated the "Civic Events Fund." Tucson, however, refused the Prayer Committee's request for support, on the basis of an established policy precluding funding of events directly supporting religious organizations. The reason for the policy, as Tucson notified Patricia Gentala in denying her funding request and has consistently maintained in this litigation, is to avoid Establishment Clause violations.[3]

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[2]From the earliest days of the public forum doctrine, it has been understood that traditional public forums like the public parks, streets, and sidewalks are open not only to secular expression but to religious expression as well. *See, e.g., Schneider v. State*, 308 U.S. 147, 160, 84 L. Ed. 155, 60 S. Ct. 146 (1939); *Jamison v. Texas*, 318 U.S. 413, 87 L. Ed. 869, 63 S. Ct. 669 (1943); *Martin v. City of Struthers*, 319 U.S. 141, 150, 87 L. Ed. 1313, 63 S. Ct. 862 (1943) (Murphy, J., concurring).

[3]For reasons that appear later, the Establishment Clause issue turns out to

(continued...)

Modern Establishment Clause doctrine is a species of constitutional inquiry which, as we shall develop as we go on, abjures absolutist doctrines and emphasizes contextual analysis instead, and in which the devil is, consequently, emphatically in the details. We therefore focus here on the features of Tucson's Civic Events Fund program with, perhaps, unusual specificity.

Tucson charges small fees ($ 75) for use of bandshells in city parks, but that general fee is not at issue in this case. Additionally, Tucson will provide, for specified fees, certain equipment and services for use at public facilities by any "civic, social, religious, charitable, commercial or other users." The Prayer Committee is therefore eligible to use the available equipment as long as it pays the applicable fee.

The available rental equipment includes, for example, display booths, portable stages, bleachers, portable public address systems, microphones, speakers, extension cords, automated refuse containers, lighting systems and serving tables. For audio and lighting equipment used at the bandshell in Reid Park, the City requires that its staff operate the equipment. The rental fees charged for the use of that equipment therefore include labor charges, and City employees operate the equipment during the event. Ordinarily, an event's organizers pay the necessary fees to the pertinent city department, which, for lighting and audio equipment, is the Parks and Recreation Department.

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[3](...continued)
be dispositive, so we concentrate here upon the facts pertinent to that issue.

The City has determined that, aside from allowing the public to use the parks, facilities such as bandshells, and city-owned equipment, the City will "support and encourage" certain "Civic Events." The kinds of events that the City wishes affirmatively to support include those that: "celebrate and commemorate the historical, cultural and ethnic heritage of the City and the nation, or increase the community's knowledge and understanding of critical issues ...[;] generate broad community appeal and participation[;] instill civic pride in the City, state, or nation[;] contribute to tourism[;] or are identified as unique community events."

The City will recognize as a Civic Event only events sponsored by non-profit organizations or "individuals conducting the events on a non-profit basis," that is, "with fund-raising proceeds used for a community benefit." This limitation means that, whether or not they meet the substantive criteria for Civic Event designation, the City does not "support and encourage" corporate picnics, commercial concerts, or private birthday or anniversary celebrations in city parks (although the City does, as we understand the record, permit organizers of such events to use city-owned equipment and personnel if they pay the required fees).[4] Also excluded from Civic Event designation and support are events sponsored by organizations that already receive city funding, whether directly or through rent waivers for use of city property. Finally, and critically here,

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[4]The record does not contain any information concerning the total number of park event permits approved for any relevant year or the total number of park events whose organizers paid fees to use city-supplied equipment or personnel. It is therefore not possible on this record to determine the percentage of all the group events held in the parks that the City supported through the Fund.

among the events that "may [not] be considered for City support through the Civic Event process "are "events held in direct support of religious organizations."

As part of its support and encouragement of Civic Events, Tucson maintains a Civic Events Fund, consisting of moneys appropriated from its general coffers and derived from tax revenue, among other sources. Organizers of eligible events may apply for payment from the Fund of any fees incurred for use of city equipment or services. When such financial support is approved, however, the City (with limited exceptions) does not provide any money directly to the event's sponsors. The city department that would ordinarily bill the event's sponsors instead bills and receives payment from the Fund. Of course, both the Fund account and the departmental account are city accounts. To implement its subsidy program, therefore, the City simply transfers on its books the amount of any fees from the Fund to the appropriate department, as "a budgetary means of detailing the costs City departments incur providing in-kind support to Civic Events."

Organizations receiving Fund support are required to: maintain financial records concerning the event and, on request, "provide City staff prompt access to such financial records and any additional financial information about the sponsoring organization"; obtain liability insurance for the event;[5] and

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[5]The City's risk manager explained that the amount of insurance required is preset for each kind of public facility; that, if the sponsor cannot obtain the required amount, the risk manager can decrease the required coverage one step, but does so no more than twice a year; that the risk classifications do not take into account the nature of the event or the identity of the sponsors; and that, to his knowledge, no event was ever cancelled for lack

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coordinate the planning of the event with a city Civic Event Coordinator. Additionally, to receive Civic Event Fund support, event organizers must promise to publicize the City's contribution of services in their event advertising and in an announcement made during the event.

In the 1996-97 and 1997-98 fiscal years, the City appropriated $170,760 from its General Fund to the Civic Events Fund. A subcommittee of the City Council made decisions on applications for support of less of than $ 1,500; the Mayor and the full Council ruled on larger requests.

The Fund application and a document entitled "Civic Event Fund Policy Statement and Evaluation Criteria" spell out the criteria for funding in great detail. Among those criteria, in addition to the substantive ones summarized above, are: the need for support, including whether the sponsoring organization can pay some or all of the fees itself and whether it has explored other sources of support; whether the funding request is a first-time request or not ("The Mayor and Council believe[] that events should eventually become self-reliant. . . . To encourage events to become self-reliant, City support provided in subsequent years may be gradually reduced."); and whether the event "generates broad community appeal and participation," although "special consideration will . . . be given to small first-time events conducted by organizations with limited resources."

Although, as the detailed criteria summarized above indicate, these funding decisions are discretionary, in the only year for

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[5](...continued)
of insurance.

which there is complete information in the record there were sufficient funds available that most non-profit groups sponsoring eligible events received funding if they asked for it. In that single fiscal year, 1995, 23 events out of 26 that met the threshold criteria were funded; the Humane Society-sponsored Fun Day in the Park, the Sister Cities Fund Raiser, and the Casa Car Show were not funded, for reasons that do not appear in the record.

The City has in the past implemented the exclusion for events directly supporting religious organizations by refusing to pay fees incurred by fundraisers for area religious schools and churches, although the events themselves were not uniformly religious in character.[6] At the same time, the Fund supported other events sponsored by religiously-affiliated organizations when the events did not directly benefit the groups themselves,[7] and events with religious themes sponsored by secular organizations. For example, in 1993, the Fund supported a Las Posadas pageant depicting theatrically events surrounding the birth of Jesus. The Las Posadas event was sponsored not by a religious group, however, but by the Tucson Festival Society and a local public school.

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[6]In fiscal years 1991-92 and 1992-93, the Fund declined to support several fundraisers for Christian schools, including the San Xavier Mission School's pageant celebrating "the heritage of the Old Pueblo," the Santa Cruz Church and school's "Fiesta de Familia," the St. John the Evangelist School's annual Fiesta, and the St. Peter & Paul School's "Fun Days." There is no information in the record concerning the City's implementation of the religious-organization exclusion in other years.

[7]For example, the City provided Fund support to a fishing clinic for disabled children sponsored by the Aid Association for Lutherans.

III. The Litigation

Two weeks before the Prayer Day event, Patricia Gentala, chair of the Prayer Committee, applied for $340 in support from the Fund for lighting and sound equipment and services. On the required application form, she identified the event as coming within the "Historical" category, enclosed a detailed description of the event, summarized above, and noted that there would be a "[f]ree will offer[]ing taken at close of program," with any extra money from that collection to be applied to the following year's event.

The Civic Events subcommittee denied Gentala's application because the event was "in direct support of a religious organization." Gentala sought City Council review of the subcommittee's denial of the Prayer Committee's application for support, and asked the City to reconsider its policy of categorically excluding "events in direct support of religious organizations" from consideration for Fund reimbursement. The City Council concluded that the denial was proper, explaining that it would violate the separation of church and state for the City to sponsor any event directly supporting a religious group.

A few weeks later, Patricia Gentala and her husband Robert Gentala, who also was actively involved in the Prayer Committee, filed this lawsuit, claiming that the exclusion of "events in direct support of religious organizations" from the Civic Events Fund violated the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment,[8] and seeking

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[8]The Gentalas also alleged that the Civic Events Fund's exclusion of events in direct support of religious organizations violated the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1-4. By the time the

(continued...)

preliminary and permanent injunctions against excluding the National Day of Prayer and other religious groups from Civic Events Fund support. The Gentalas styled their complaint as both a facial challenge to the policy and a challenge to the policy as applied to them.

On September 30, 1997, the district court denied the Gentalas' motions for an injunction. The district court recognized that the First Amendment's speech protection "extends to religious speech and expression, including prayer and worship," and that, where the government establishes, by tradition or design, a public forum for communicative activity, exclusion of religious speech and expression can be justified only if necessitated by Establishment Clause considerations. The district court noted that the case on which the Gentalas most heavily rely is *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995), in which the Supreme Court held unconstitutional the exclusion of a religiously-oriented publication from a university program for funding the printing costs of student publications from mandatory student fees. *Rosenberger*, the district court recognized, is similar to this case in some respects but dissimilar in others. In particular, the district court stressed, *Rosenberger* involved neither the expenditure of tax-derived funds nor funding for a religious organization, while in this case "Plaintiffs represent religious groups seeking tax dollars to support a religious event." As a

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[8](...continued)
district court ruled in this case, however, that statute had been held unconstitutional, so the district court did not consider this part of the Gentalas' complaint. *See City of Boerne v. Flores*, 521 U.S. 507, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997).

result, the district court concluded, *Rosenberger* is not determinative here, and "the dispositive inquiry in this case must be made under the Establishment Clause."

Conducting that inquiry, the district court began by observing that, in cases raising issues at the intersection of the Free Speech and Establishment Clauses, "'specific features of a particular government action,'" not any "'Grand Unified Theory that may turn out to be neither grand nor unified,'" (quoting *Rosenberger*, 515 U.S. at 853 (O'Connor, J., concurring)), are central in deciding whether the government is, on the one hand, required to support religiously-oriented speech activities or, on the other hand, precluded from doing so by the Establishment Clause. Noting that *Rosenberger* had stressed that "if the State pays a church's bills it is subsidizing it, and we must guard against this abuse," 515 U.S. at 844, the district court held that compelling Establishment Clause considerations justified the City's denial of the Prayer Committee's funding request because: (1) the Prayer Committee was seeking access to general tax funds; (2) the Prayer Committee is a sectarian religious organization; and (3) if the event were "paid for, equipped by, and operated by the City," there would be a distinct likelihood of creating "the impression that the City was engaged in a costly joint-enterprise with a religious group for religious purposes."

The district court also rejected the Gentalas' contention that the degree of discretion available to the risk manager with regard to the implementation of the insurance requirement constituted an impermissible prior restraint of the Gentalas' speech.

The Gentalas appealed. We affirm, for reasons in most respects similar to those relied upon by the district court.

Standard of Review

Observing that the critical facts were undisputed, the district court found that the Gentalas had suffered no harm, denied their motions for preliminary and permanent injunctive relief, and, granting their motion to consolidate the preliminary injunction hearing with the trial on the merits, dismissed their suit. Ordinarily, when a district court consolidates a hearing on a motion for preliminary injunction with a trial on the merits, its findings of fact are reviewed for clear error and its legal conclusions de novo. *Pinette v. Capitol Square Review & Advisory Bd.*, 30 F.3d 675, 677 (6th Cir. 1994), *aff'd*, 515 U.S. 753, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995). Because the facts here are undisputed, we review the district court's decision de novo. Moreover, "[w]hen the district court upholds a restriction on speech as constitutional, we conduct a de novo review of the facts." *Tucker v. California Dep't of Educ.*, 97 F.3d 1204, 1209 n. 2 (9th Cir. 1996); *see also Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir. 1988) (explaining that the rule that "[w]e review de novo the district court's application of law to facts on free speech issues . . . reflects a special solicitude for claims that the protections afforded by the First Amendment have been abridged") (internal citations omitted).

Discussion

I. The Free Speech Issues

The Gentalas' basic submission in this case is that the City's categorical exclusion of events "in direct support of religious organizations" from Fund support impermissibly infringes on the free speech rights of religious organizations such as the

Prayer Committee, based on their religious point of view.[9] The parties have therefore, quite understandably, argued vigorously about the free speech aspects, drawing upon different strains of First Amendment doctrine concerning the role of government in supporting communicative activity.

The Gentalas, for example, maintain that the Civic Events Fund is, under the tripartite forum analysis we use to determine the government's obligations when it permits or encourages the use of its property for communicative activity by private

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[9]Although the Gentalas challenged the City's policy both on its face and as applied to them, under the circumstances of this case the two inquiries are effectively one. In considering a facial challenge to the policy, we study the words themselves and the City's "authoritative constructions" of them, through "its own implementation and interpretation" of the policy. *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 131, 120 L. Ed. 2d 101, 112 S. Ct. 2395 (1992). Based on the record before us, the City's application of the blanket exclusion on funding "events in direct support of religious organizations" to the Prayer Committee is fully consistent with and illustrative of its implementation of the policy in other instances in the record.

As for the Gentalas' claim that the exclusion is overbroad, they have not demonstrated that the exclusion chills the protected expression of any parties not before the court, *City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 797, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984), and there is no reason to think that it does. The record suggests, instead, that the exclusion effects little, if any, chilling of protected speech. The Prayer Committee, for example, held a successful prayer service in a city park undeterred by the fact that it did not have the use of the City's sound and light equipment. Nor have the Gentalas shown any material difference between the Civic Events policy as applied to them and as applied to any other speaker affected by the categorical exclusion of events in direct support of religious organizations. Thus, this case is not a candidate for First Amendment overbreadth analysis. *Id.* at 801-02.

speakers, either a limited public forum or a nonpublic forum.[10] In either case, the Gentalas seek to convince us, discriminating against groups in the distribution of Fund support on the basis that their speech expresses a religious viewpoint is unconstitutional. In support of this contention, the Gentalas cite, *inter alia*, *Rosenberger*, *Widmar v. Vincent*, 454 U.S. 263, 271, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981), and *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384, 394, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993), cases which hold that the government, in administering a limited public forum, may not exclude some or all types of religious expression.[11]

Tucson, not surprisingly, is of the view that the cases the Gentalas rely upon are not pertinent at all to the speech issues in this case. Rather, Tucson argues, the situation here fits into an entirely different mode of First Amendment speech analysis, applicable when the government is in some measure engaged in communicative activity, as it was in *National Endowment for the Arts v. Finley*, 524 U.S. 569, 141 L. Ed. 2d 500, 118 S. Ct. 2168 (1998) (government as patron), *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 140 L. Ed. 2d 875, 118 S. Ct. 1633 (1998) (government as editor), and *Rust v. Sullivan*, 500 U.S. 173, 193, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991) (government as policy proponent). In all of those cases, some

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[10]*See, e.g.*, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46-57, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985); *DiLoreto v. Downey Unified Sch. Dist.*, 196 F.3d 958, 966-67 (9th Cir. 1999).

[11]The precise reach of the free speech analysis of these cases is currently pending before the Supreme Court in *Good News Club v. Milford Central School*, 202 F.3d 502 (2d Cir.), *cert. granted*, 121 S. Ct. 296 (2000).

degree of viewpoint or qualitative selection criteria were permitted because the government was engaged not simply in providing a forum for private speech but in forwarding its own program through the speech of others. *See, e.g., Forbes*, 523 U.S. at 673-74 (noting that the government sometimes assumes roles, such as public broadcaster or curriculum developer, in which its exercise of "editorial discretion" in choosing among prospective speakers is a speech activity on behalf of the government itself, not subject to forum analysis); *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1016-17 (9th Cir. 2000) (holding that a school district could control the content of messages posted on high school bulletin boards "without the constraint of viewpoint neutrality").

Each of these opposing characterizations of the City's role in developing and expending its Civic Events Fund has some considerations in its favor. On the one hand, the City in this case, like the university in *Rosenberger*, is administering a fund providing in-kind services for a wide range of speakers. A large majority of speakers who meet the applicable Civic Events criteria were in fact funded during the period for which there is evidence in the record, so the very strong element of qualitative governmental selectivity involved in cases such as *Finley* (concerning the administration of the National Endowment for the Arts) or *Forbes* (concerning the editorial discretion necessary in making journalistic decisions) is not present here.

On the other hand, the criteria for funding here are more selective than in *Rosenberger*, albeit not as selective and discretionary as in *Finley* and *Forbes*. That most projects are funded may evidence only self-selectivity by event organizers aware of the applicable criteria or, more probably, the availability of sufficient funds for the period in question, a

circumstance that may not always prevail. Additionally, the City's policy goals here are not, one might conclude, similar to those of the university in *Rosenberger*; while the university was concerned with assuring a vigorous interchange of ideas among students as part of the educational process, the City is concerned with providing for its citizens and tourists events of certain kinds that the City believes enhance Tucson's ambiance as an attractive place to live and visit. Because that is the goal, the City affirmatively identifies itself as the sponsor of funded events, placing its imprimatur on the events in a manner somewhat like the editor of an anthology does, while the university in *Rosenberger* did quite the opposite. *See* 515 U.S. at 841.

Were we required to select among the mutually exclusive Free Speech Clause paradigms the parties propound--each leading under currently prevailing First Amendment doctrine to a different result concerning the City's authority to exclude speakers from a government-provided subsidy because they are engaged in a prayer service--the choice would be a difficult one. It is a choice we need not make, however, in order to resolve this case. For, even assuming that the Gentalas have the better of the battle of the paradigms, that conclusion would not end the inquiry. Rather, as the Supreme Court and this court have indicated repeatedly, the government may decline to subsidize private religious speech when doing so would violate the Establishment Clause, or, put another way, avoiding a violation of the Establishment Clause is a sufficiently compelling reason to justify government's exclusion of certain private speech in a forum otherwise dedicated to

communicative activity.[12] *See, e.g., Rosenberger*, 515 U.S. at 837; *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995);[13] *Lamb's Chapel*, 508 U.S. at 394; *Widmar*, 454 U.S. at 271; *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1101 (9th Cir. 2000), *pet. for cert. filed* Jan. 2, 2001; *cf. Tucker*, 97 F.3d at 1212. We therefore agree with the district court that if the City's Establishment Clause justification for the Civic Events Fund's religious exclusion is valid, then the exclusion is valid as well.[14] It is to the Establishment Clause inquiry,

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[12]For the same reason, we need not determine whether the Civic Events Fund's exclusion for events directly supporting a religious organization is in fact viewpoint discriminatory or, instead, is more accurately characterized as a content or identity distinction, because the Establishment Clause justification would suffice even if the exclusion is viewpoint discriminatory.

[13]As the *Capitol Square* Court explained in analyzing whether a city could bar a private group's placement of a cross in a public square: "There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." 515 U.S. at 761-62. Given *Capitol Square*'s factual context and the Court's citation to *Lamb's Chapel* and *Widmar* for the just-stated principle, the *Capitol Square* Court plainly meant that private religious expression in a public forum, however defined, *see* n. 11, *supra*, not only is protected by the Free Speech Clause, but also is subject to the constraints of the Establishment Clause.

[14]We note that the considerations just canvassed in summarizing the competing free speech arguments do become pertinent to our Establishment Clause analysis, for they are informative in determining the degree to which the City's Fund program constitutes an endorsement of the private speech involved, a key Establishment Clause consideration. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000);

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therefore, that we now direct our attention.

II. The Establishment Clause

To embark on that inquiry, however, is not necessarily to simplify matters greatly, for modern Establishment Clause jurisprudence is famously indistinct. As a recent summary of the last century's Religion Clause cases put it:

> The Supreme Court is presently split closely on almost all important issues of . . . separation of church and state. . . . Resolution of difficult issues in this area "depends on the hard task of judging--sifting through the details. . . . Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case." [*Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring)]. As a consequence of these realities, the current development of the law provides more themes than categorical principles, with little doctrinal stability.

Jesse H. Choper, *A Century of Religious Freedom*, 88 Cal. L. Rev. 1709, 1741 (2000). The most propitious approach to the perplexities of Establishment Clause doctrine, we have concluded, is to begin by examining three of the Establishment Clause "themes" involved both in *Rosenberger*, the case on which the Gentalas most heavily rely and which is indeed quite similar to this one in many respects, and in this case as well. We then turn to the details of Tucson's Civic Events program to see why, as we hold, the Establishment Clause considerations play out differently on the facts of this case than they did in *Rosenberger*.

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[14](...continued)
see also pp. 1079-81, *infra*.

A. Establishment Clause Analysis in *Rosenberger* and Thereafter

In *Rosenberger*, the Supreme Court examined a Student Activities Fund ("Activities Fund") program at the University of Virginia to determine whether Wide Awake Productions, an evangelical student-written newspaper otherwise eligible for an Activities Fund subsidy to cover its printing costs, could be denied the subsidy because the publication constituted a "religious activity." The Activities Fund was financed through mandatory student activity fees; qualified student groups were required to submit their bills to the Student Council for payment from the Activities Fund. 515 U.S. at 824. The Court concluded that the Activities Fund was, for purposes of Free Speech Clause analysis, a designated public forum, albeit "a forum more in a metaphysical than in a spatial or geographic sense," from which the University could not exclude speakers based upon their viewpoint. *Id.* at 830-31. After determining that the exclusion of Wide Awake Productions was based on its Christian viewpoint rather than on its content, the Court held that, ~~absent a~~ compelling justification, denying Activities Fund support to Wide Awake would be a denial of the First Amendment's Free Speech guarantee. *Id.* at 837. The Court then turned, as we have turned here, to the question whether the exclusion "is excused by the necessity of complying with the Constitution's prohibition against state establishment of religion." *Id.*

In doing so, the Court discussed three considerations that have been of great importance in recent Establishment Clause analysis, each of which has been further developed in subsequent cases:

First, the majority opinion in *Rosenberger* emphasized that the Student Activities Fund program, if revised to include religiously-oriented publications, would not single out religion for special benefits, but, instead, would be "neutral toward religion." 515 U.S. at 840. At the same time, the Court in *Rosenberger* did not rest on the neutrality consideration. Instead, the Court observed that Establishment Clause analysis, as in comparable cases, turned not only on "general principles," *id.* at 839, namely the Activities Fund's neutrality toward religion, but also on other "practical details of the program's operation." *Id.*

Moreover, neutrality is merely "one hallmark of the Establishment Clause," as Justice O'Connor convincingly explained in *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring):

> Our cases have permitted some government funding of secular functions performed by sectarian organizations. [citations omitted]. These decisions, however, provide no precedent for the use of public funds to finance religious activities.
>
> This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities. . . . Not to finance Wide Awake, according to petitioners, violates the principle of neutrality by sending a message of hostility toward religion. To finance Wide Awake, argues the University, violates the prohibition on direct state funding of religious activities.
>
> When two bedrock principles so conflict, understandably neither can provide the definitive answer. Reliance on categorical platitudes is unavailing.

Id. at 847.

Since *Rosenberger*, the Supreme Court has continued to struggle mightily over the question whether neutrality toward religion is sufficient, or nearly sufficient, to justify government subsidies of core religious activity, whatever else may be the case. A majority of the Court, however, made quite clear last term, if it was not clear before, that, although neutrality is an important consideration in Establishment Clause cases, that consideration alone is not determinative where government subsidy of religious activity is concerned.

Thus, Justice Souter, writing for three justices, after first reviewing at length the history of the neutrality concept in Establishment Clause jurisprudence, *Mitchell v. Helms*, 530 U.S. 793, 120 S. Ct. 2530, 2578-81, 147 L. Ed. 2d 660 (2000) (Souter, J., dissenting), stated:

> 'Neutrality' [meaning] generality or evenhandedness of distribution . . . is relevant . . . but this neutrality is not alone sufficient to qualify the [government] aid as constitutional. It has to be considered only along with other characteristics of aid, its administration, its recipients, or its potential that have been emphasized over the years as indicators of just how religious the intent and effect of a given aid scheme really is.

Id. at 2581. Similarly, in her opinion for two justices in *Mitchell*, *id.* at 2557 (O'Connor, J., concurring in the judgment), Justice O'Connor decisively reiterated the position she took in her *Rosenberger* concurrence against neutrality as *the* determining factor in Establishment Clause cases, stating: "Neutrality is important but it is by no means the only 'axiom in

the history and precedent of the Establishment Clause.' *Rosenberger*, [515 U.S. at 846 (O'Connor, J., concurring).] . . . Neutrality is not alone sufficient to qualify the aid as constitutional."

We are left, then, with the clear holding by a Supreme Court majority that when the government subsidizes religious activity, the fact that it is doing so pursuant to a program that treats religious speech or association coequally with other speech or association is not, standing alone, determinative in Establishment Clause analysis. Instead, we are obligated to consider other factors in determining whether the connection between the government subsidy and the religious activity is such as to violate the concerns underlying the Establishment Clause (including, most importantly, the two we next discuss).[15]

Second, the central concern making *Rosenberger* a close and difficult case was that the subsidy to religious expression involved was not simply the use of government space, generally open to the public or to some subgroup thereof for expressive activity, *see Lamb's Chapel*, 508 U.S. at 395; *Widmar*, 454 U.S. at 271-72 & n. 12, but a form of governmental financial support for religious activity. The *Rosenberger* Court, far from discounting this consideration, recognized that "[t]he Court of Appeals (and the dissent) are correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes

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[15]Judge Fernandez argues in dissent that because the City's Fund policy is not neutral toward, but expressly excludes, religious organizations, it necessarily goes beyond what the Establishment Clause requires. As just discussed, however, while Judge Fernandez' position that neutrality toward religion is all that matters has been advocated by a plurality of the Court, five justices decisively rejected that position in *Mitchell*.

direct money payments to sectarian institutions." 515 U.S. at 842. And indeed, the prohibition on funding religious activities has been preeminent among establishment of religion concerns, depending upon one's view of history, from the nation's infancy, *see id.* at 868-76 (Souter, J., dissenting); *see also id.* at 846-47 (O'Connor, J., concurring) (agreeing that the "axiom" that "'[p]ublic funds may not be used to endorse the religious messages"' [citation omitted] has long been a "bedrock" of Establishment Clause jurisprudence); *compare id.* at 853-63 (Thomas, J., concurring), or, at least, since *Everson v. Board of Education*, 330 U.S. 1, 17-18, 91 L. Ed. 711, 67 S. Ct. 504 (1941) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.").[16]

Rosenberger explicitly so recognized, noting that "if the State pays a church's bills it is subsidizing it, and we must

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[16]It is worth noting, because the distinction becomes lost on occasion, that the funding concern and the endorsement concern next discussed, while overlapping in some respects, are not one and the same, nor is one a subcategory of the other. The funding concern centers in large part on the interest of citizens in resisting coercion to subsidize religious ideas in which they disbelieve. *See, e.g., Flast v. Cohen*, 392 U.S. 83, 103-04, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968); *Everson*, 330 U.S. at 15-16. The endorsement concern, in contrast, centers upon the disturbance of civic society that occurs when the government appears publicly to favor one religion over another, or religion over nonreligion. *See, e.g., Santa Fe*, 120 S. Ct. at 2278; *Capitol Square*, 515 U.S. at 779. The funding factor would have force, for example, even if the government kept secret the fact that tax funds were being funneled directly to churches to finance their services, while the endorsement "theme" would be of concern if the government proclaimed an official religion without providing its adherents any funding at all.

guard against this abuse." 515 U.S. at 844. The *Rosenberger* Court nonetheless held, for several reasons, that the funding prohibition was not of controlling importance in that case, emphasizing that: (1) the mandatory fees comprising the Activities Fund were an "exaction upon the students," not "a general tax designed to raise revenue for the University,"[17] *id.* at 840-41; *see also id.* at 841 ("'A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government.'" (quoting *United States v. Butler*, 297 U.S. 1, 61, 80 L. Ed. 477, 56 S. Ct. 312 (1936)); *id.* ("Our decision, then, cannot be read as addressing an expenditure from a general tax fund."); 515 U.S. at 851-52 (O'Connor, J., concurring); (2) Wide Awake was a "student publication[,] ... not a religious institution, at least in the usual sense of that term as used in our case law," so that, in paying Wide Awake's bills, the University was not paying the bills of a church or similar organization, *id.* at 844;[18] (3) the activity funded did not involve "religious exercises," *id.* at 842; and (4) the benefit provided did not involve direct funding of

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[17]In other contexts as well, the Supreme Court has repeatedly emphasized the distinction between general taxes and mandatory fees levied on a select group of people to support activities in their common interest. *See Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 469-70, 138 L. Ed. 2d 585, 117 S. Ct. 2130 (1997); *Keller v. State Bar of Cal.*, 496 U.S. 1, 12-13, 110 L. Ed. 2d 1, 110 S. Ct. 2228 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 n. 13, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977).

[18]The policy at issue in *Rosenberger* did not permit use of the Activities Fund to subsidize "religious organizations," defined as organizations "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." 515 U.S. at 826. The Court ascribed considerable significance to the fact that the University did not contend that Wide Awake was a "religious organization" under its definition. *Id.* at 844.

religious speech, since the University did not provide eligible student groups with direct financial assistance but instead paid their printing bills. *Id.* at 842-44.

Third, also prominent in *Rosenberger* was the concern that subsidizing Wide Awake's religiously-oriented publication could be perceived as a governmental endorsement of the religious ideas propounded by its student editors. The Court recognized that the Establishment Clause forbids "'*government* speech endorsing religion,'" 515 U.S. at 841 (quoting *Board of Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 250, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990) (plurality opinion) (emphasis in original)), but concluded that, "[i]n this case, 'the government has not fostered or encouraged' any mistaken impression that the student newspapers speak for the University." 515 U.S. at 841 (quoting *Capitol Square*, 515 U.S. at 766). In particular, the Court noted that "[t]he University has taken pains to disassociate itself from the private speech involved in this case," *Rosenberger*, 515 U.S. at 841; for example, the University required all recognized student organizations to sign an agreement stating that the recognition does not signal University "approval of the organizations' goals or activities," and also required each publication to include the statement that it was independent of the University, and that the University was not responsible for its actions. *Id.* at 824; *id.* at 849 (O'Connor, J., concurring). Given this agreement and disclaimer, as well as the fact that Wide Awake competed with many other Activities Fund-supported publications for the University community's attention, it was extremely unlikely that observers would perceive that the University was endorsing the views put forward in *Wide Awake*.

Since *Rosenberger*, the precise nature of the Establishment

Clause endorsement inquiry, like the role of the neutrality principle, has been clarified. *Santa Fe* centered on the endorsement question, stressing that the concern underlying the endorsement inquiry is that governmental identification with religious speech or worship communicates to nonadherents "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." 120 S. Ct. at 2279.[19] To determine whether a government subsidy to religion constitutes "actual or perceived endorsement," the Court stressed, requires a highly fact-specific inquiry, directed at the question "whether an objective observer, acquainted with the text, . . . history, and implementation of the [program] would perceive it as a state endorsement" of religious observance. *Id.* at 2278.

Rosenberger and the Court's post-*Rosenberger* cases, then, provide a modicum of theoretical insight into the applicable Establishment Clause "themes," and, more usefully perhaps, substantial practical insight into the specific factors most likely to be informative as we focus our attention on the interaction among these various considerations in the circumstances of this case.

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[19]*Santa Fe* concerned the offering of pre-game prayers over a high school's public address system at school football games. Applying the endorsement analysis, the Court determined that, although the prayer was delivered by a student selected by other students, in the atmosphere of school sponsorship inherent in the setting, "an objective Santa Fe High School student [would] unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval." 120 S. Ct. at 2278.

B. "Sifting Through the Details"

As the foregoing analysis suggests, cases of this kind--that is, those at the intersection of the Free Speech and Establishment Clauses--are ones in which the admonition that Establishment Clause "jurisprudence . . . is of necessity one of line-drawing," *Lee v. Weisman*, 505 U.S. 577, 598, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992), has particular force. Turning to the line-drawing task, we conclude that this case involves significant factual differences from *Rosenberger* in matters that were deemed important to that case's Establishment Clause analysis. There are also some contextual matters that we deem to be important but that had no counterpart in *Rosenberger*. The upshot is that, looking at these factors as a whole, we conclude that in this case, the public funding and government endorsement considerations considerably overwhelm the neutrality consideration, and lead us to the conclusion that Tucson's Establishment Clause justification for its religious organization exclusion is valid.

(1) Tax-based funding of religious organization

Considering the governmental funding of religion, there are a number of factors that are precisely opposite in this case from a factor deemed important in *Rosenberger*. Here, the source of the Civic Events Fund moneys includes general tax revenue, not simply fees levied against a discrete group of citizens. Also, Tucson excludes funding only for events supporting religious organizations, and the Prayer Committee is preeminently a religious organization; Wide Awake, in contrast, was a student newspaper with a religious viewpoint, not an "organization whose purpose is to *practice a devotion* to an acknowledged ultimate reality or deity." *Rosenberger*, 515 U.S. at 840

(quoting the university's definition of "religious organization") (emphasis added). Further, the activity funded here was a participatory religious service, led by ministers and consisting primarily of prayer, not a written document, however proselytizing. Unless we are to believe that the *Rosenberger* Court's explicit reliance on each of these three considerations was without significance, we must conclude that in this case, unlike in *Rosenberger*, Civic Events Fund subsidies of the Prayer Day and similar events would be tantamount to "the State pay[ing] a church's bills." *Id.* at 844.

Moreover, Tucson's administration of its Civic Events Fund involves considerably more discretionary decisionmaking than did the university's administration of the Activities Fund in *Rosenberger*. Here, the City has retained a good deal of subjective discretion concerning which events to fund, including establishing fairly general substantive criteria, criteria relating to the organization's (and the Fund's) financial circumstances, criteria related to whether the event is a first-time or ongoing event, and criteria concerning the likely appeal of the event to the citizenry. That most nonprofit organizations' events are nonetheless funded does not detract from the fact that City officials do in fact review each application and make a decision using City-established criteria, that some applications *are* denied, and that the very existence of multiple criteria for funding likely leads to self-selection by otherwise eligible organizations. As a result, one cannot escape the conclusion, in this case, that it is the City making the choice which events to fund, a circumstance that, the Supreme Court has suggested, greatly exacerbates the significance of the tax-based derivation of the funding. *See Mitchell*, 120 S. Ct. at 2541-43 (plurality opinion) (stressing the importance of private, as opposed to governmental, funding choices as to whether tax-

derived funds will be used by a religious institution pursuant to a program neutrally available to secular as well as religious institutions); *id.* at 2558-59 (O'Connor, J., concurring) (agreeing with the plurality's stress on the importance of private choice, but maintaining that the private choice must be a true, individual choice, not a governmentally-prescribed aid formula).

Finally, we note that Tucson's exclusion for events in direct support of religious organizations appears to apply principally where, as here, the event will raise money from attendees that could be used to fund the organization in the future. The Gentalas, for example, explained their need for City funding in part by their desire to generate a surplus from the "free will offering." There is therefore the additional concern, not present in *Rosenberger* or in any other case concerning governmental funding of religious activity of which we are aware, that although the subsidy provided is in-kind and in that sense indirect, it is intended for use effectively as seed money to generate other, non-earmarked funds for the religious organization. The exclusion for events "in direct support of religious organizations" therefore functions similarly to a prohibition on cash grants to religious organizations. *Rosenberger*, 515 U.S. at 842.

(2) City Endorsement of Religion

Turning to the question "whether an objective observer, acquainted with the text, . . . history, and implementation of the [program] would perceive it as a state endorsement" of any religious observance funded, *Santa Fe*, 120 S. Ct. at 2279, we conclude that there are considerably more reasons that such an observer would so conclude regarding Tucson's Civic Events Fund than there were in *Rosenberger*.

Here, the subsidy often includes, as it would have for the Prayer Day event, the on-site, observable presence of city employees, not simply the behind-the-scenes payment of bills from private vendors, as in *Rosenberger*. Moreover, the equipment used--microphones, lighting systems, tables, public address systems--is city-owned and is likely to be quite visible to onlookers during the event.

Additionally, the detailed, subjective funding criteria discussed above, as well as the role of the Mayor and Council in establishing and applying those criteria, would contribute to an informed observer's impression that an event that survives the review process is one that the City affirmatively endorses. Contributing to that impression would be the fact that many, probably most, events in the parks do have to pay the prescribed fees because they are not eligible for Civic Events Fund designation. In short, the City has retained a role for itself something like that of impresario, selecting the events that are consistent with the image of Tucson that the City wishes to foster and that therefore merit public subsidy.

Consistent with the impression created by the funding process, the City's policy and application form make clear that the Civic Events Fund program is *meant* to endorse some events as "Civic Events" worthy of the City's imprimatur. A person acquainted with the funding program's text, history, and implementation would know, for example, that the governing policy statement expressly states that "the Mayor and Council *encourage and support* Civic Events, "(emphasis added), which are then described by category; that the phrase "Civic Events" is always capitalized in the policy statement even when no funding is at issue, indicating a city-conferred title or status; and that organizers of funded events are directed to deal with a

city official denominated the "Civic Event Coordinator" in order to "obtain assistance in coordinating the event." Of a piece with these other indicia of endorsement is the additional, significant requirement that, far from declaring their independence from the government funder as in *Rosenberger*, organizers of Civic Events Fund-subsidized events must call attention to the City's supportive role both in pre-event advertising and at the event itself.

It is true, as the district court noted in discounting the significance of the latter point, that the City could simply remove this acknowledgment requirement if it chose. That observation is not pertinent to our analysis, for two related reasons.

First, as the other factors summarized above indicate, the express acknowledgment requirement simply confirms the overall nature of the Civic Events program as one in which the City affirmatively supports certain privately-originated events. The acknowledgment requirement does not itself create that relationship. To require the City to hide its true relationship to the event would not alter that relationship, but instead, would only mislead the public.

Second, the courts are not in the business of designing governmental programs but, instead, of taking them as they find them and determining their constitutional significance. Thus, for example, the Court in *Forbes*, 523 U.S. 666, 140 L. Ed. 2d 875, 118 S. Ct. 1633, did not direct the government henceforth to run its broadcasting stations on an open microphone basis so as to avoid editorial decisions but, instead, viewed the broadcasting program as one in which editorial decisions were important and came to its conclusions about the Free Speech rights of those seeking access to the broadcasting station

accordingly. Nor did the Court solve the knotty Free Speech issues regarding government funding for the arts involved in *Finley*, 524 U.S. 569, 141 L. Ed. 2d 500, 118 S. Ct. 2168, by informing the government that it should fund the arts on a first-come-first-served basis. *See id.* at 598 (Scalia, J., concurring in the judgment) ("It is the very business of government to favor and disfavor points of view on . . . innumerable subjects. . . . [Government] further[s] [a] favored point of view by achieving it directly, . . . by advocating it officially, . . . or by giving money to others who achieve and advocate it."); *Downs*, 228 F.3d at 1013-14. To require Tucson to drop its express support of preferred community events in favor of an objective, hands-off funding system in order that events in direct support of religious organizations could be funded would be to require the City to abandon its present program and substitute a different one, a ukase beyond our authority as a court.

We note, as well, that the nature of Tucson's Civic Events Fund program is such that allowing various religious organizations to compete for funding would lead to some of the very dangers the Establishment Clause was intended to prevent. For one thing, in order to comply with the City's emphatically secular criteria for funding, religious event organizers would be likely to "secularize" their events. *Lee*, 505 U.S. at 608 (Blackmun, J., concurring). Although the focus on the community's "historical, cultural, and ethnic heritage," "critical issues," and "civic pride" may be commendable, creating an incentive to structure religious events toward such worldly objectives would encourage the dilution of spiritual life, not enhance it. And while fairly small sums are at issue here, the Establishment Clause principles examined above admit no distinction between large grants to religion and small ones.

Further, the necessity of applying subjective substantive criteria could result in the City impermissibly promoting some faiths over others. *Lee*, 505 U.S. at 627 (Souter, J., concurring); *Everson*, 330 U.S. at 15. Some religions are likely to have more "broad community appeal" than others, or to "contribute to tourism" more readily. Concerns about the dangers of such government favoritism to the cohesiveness of civil society echo down from the Framers to the Supreme Court's most recent jurisprudence. *Compare* James Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶9 (1785) (observing that government favoritism toward certain faiths "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority"), *with Santa Fe*, 120 S. Ct. at 2279 (noting that government sponsorship of a religious message communicates to nonadherents "'that they are outsiders, not full members of the political community' " (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984) (O'Connor, J., concurring)).

The short of the matter is that, after "sifting through the details," we are convinced, first, that this case and *Rosenberger*, for all their superficial similarity, are different in most of the details that matter for Establishment Clause purposes, and, second, that all of the ways in which they differ point toward an Establishment Clause violation in this case.[20]

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[20]Judge Kleinfeld suggests, in his dissent, that the record as it stands is inadequate to decide the issues before us. We disagree.

Judge Kleinfeld treats the factual question whether the City was in practice selective in expending Civic Events Fund moneys as all-important, accuses us of "believ[ing] that the very fact that some applications are

(continued...)

C. Relevance of Free Exercise Clause to the Establishment Clause

One final point: We do not agree that, as Judge Fernandez' dissenting opinion maintains, Free Exercise Clause considerations require that we alter our Establishment Clause analysis.

Denying financial subsidies to religious organizations does not, standing alone, substantially burden Free Exercise rights. As the Supreme Court observed in *Bob Jones University v. United States*, 461 U.S. 574, 603-04, 76 L. Ed. 2d 157, 103 S. Ct. 2017 (1983), religious schools' ineligibility for a tax exemption due to their racially discriminatory practices might impose significant burdens on their operations, but any such administrative burdens would "not prevent those schools from observing their religious tenets." *See also Hernandez v. Commissioner*, 490 U.S. 680, 699, 104 L. Ed. 2d 766, 109 S. Ct. 2136 (1989) (denial of tax deduction not a Free Exercise Clause violation); *Swaggart Ministries v. California Dep't of Equalization*, 493 U.S. 378, 391-92, 107 L. Ed. 2d 796, 110 S.

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[20](...continued)
denied is enough to decide this case," (*post*, at 1086), and then notes that the record contains limited information on the denial-rate question. But we do not agree that the actual selectivity question is determinative. Rather, as the above analysis indicates, that some applications are denied is pertinent only because that fact tends to confirm that the city is doing what its program documents in no uncertain terms state that it is doing, namely, affirmatively promoting certain events as city-endorsed and approved. The other indices of endorsement, surveyed in the text, are sufficient to raise Establishment Clause concerns even if, in a given year, the City determines that all applicants for Civic Events Fund support meet the requisite, detailed criteria for funding and that sufficient funding is available for all of them.

Ct. 688 (1990) (same).

Here, the claim of denial of Free Exercise rights is particularly weak. The Gentalas have made no showing that their ability to worship as they choose has been discernibly burdened by the operation of the Civic Events program. Rather, the Prayer Committee staged a well-attended prayer service in a City-provided location, the Reid Park bandshell. *See Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 763 (9th Cir. 1981). In Free Exercise terms, then, the government's denial of a financial subsidy for microphones and lights to a religious group is a far cry from its outright prohibition of the group's religious practice. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993) (holding that ordinance prohibiting a religious group's ritual violated the Free Exercise Clause).

Moreover, the refusal to fund the Prayer Committee's microphones and lighting is also a far cry from denying a religious organization or event services essential to survival in civil society, such as police and fire protection. Police and fire protections are vital public services to which all citizens enjoy a basic entitlement. Denying such services to a particular group of citizens would both evince government hostility and threaten the group's ability to exist. The same simply cannot be said of Tucson's program, a subsidy for items such as microphones and stage lights for special events, available only to a limited set of potential users and in no way necessary for survival in the modern world. Indeed, if the failure to subsidize a religious activity with regard to expenditures that are in no way analogous to basic public safety services violated the Free Exercise Clause, the Court would have said so in *Rosenberger* and written a very different, and much shorter, opinion.

We therefore conclude that Tucson was correct that it could not provide funding to "events in direct support of religious organizations" generally, or to the Prayer Day event in particular, without violating its constitutional obligations regarding the separation of church and state.

Conclusion

Because we agree with the City that its policy is mandated by the Establishment Clause, we need not reach the question that the City raises on cross-appeal: whether the district court should have granted the City leave to amend its answer to add an affirmative defense derived from the Arizona Constitution's religion clauses.[21] The federal Constitution provides all the defense Tucson needed in this lawsuit. We affirm the district court in all respects.

AFFIRMED.

FERNANDEZ, Circuit Judge, dissenting:

As I see it, this case is not about speech, or viewpoints of speakers, at all. It is solely about outright discrimination against religious organizations. As such, it does violate the First Amendment, but not the clause which precludes government from "abridging the freedom of speech." Rather, it violates the clauses which command that government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." As I shall explain, that does not make the law any less malignant.

Because it is where the City of Tucson (as well as the

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[21]We affirm the decision below on the insurance issue for the reasons stated by the district court.

majority) starts, I shall first address the speech issue, and in so doing I shall begin with the City's "Civic Event Policy Statement and Evaluation Criteria." That is both inclusive and exclusive. It provides for City support of civic events which either "celebrate and commemorate the historical, cultural and ethnic heritage of the City and the nation, or increase the community's knowledge and understanding of critical issues," or "generate broad appeal and participation," or "instill civic pride," or "contribute to tourism," or "are identified as unique community events." A large menu of choices of great breadth! The support of those events does *not* come in the form of cash paid to the sponsoring organizations; it comes in the form of accounting transfers within the City's departments to defray such "typical event-related services" as police protection, clean up (including street sweeping), use of park event equipment, and the like.

A wide array of non-profit organizations, indeed almost all of them, can participate. The only types of organizations excluded at the threshold are those that are receiving a special City benefit already, and religious organizations. As the policy puts it, "events held in direct support of religious organizations" are *not* eligible for support.

The parties spill a great deal of ink over whether the fund thus created is a forum and, if so, just what type of forum it is. The purpose of that liquid flood is to decide just what restrictions the City can place upon speech, if any. Of course, it is a commonplace that the government can have, and sponsor, a restrictive viewpoint, if it is the speaker. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 192-200, 111 S. Ct. 1759, 1771-76, 114 L. Ed. 2d 233 (1991); *Downs v. Los Angeles Unified School District*, 228 F.3d 1003, 1013-16 (9th Cir. 2000); *cf. Nat'l*

Endowment for the Arts v. Finley, 524 U.S. 569, 586-88, 118 S. Ct. 2168, 2178-79, 141 L. Ed. 2d 500 (1998) (grants need not be entirely neutral); *Regan v. Taxation With Representation*, 461 U.S. 540, 544-51, 103 S. Ct. 1997, 2000-04, 76 L. Ed. 2d 129 (1983) (government can choose not to subsidize lobbying with tax exemptions). On the other hand, if some sort of forum is created, the government cannot "discriminate against speech on the basis of its viewpoint." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829, 115 S. Ct. 2510, 2517, 132 L. Ed. 2d 700 (1995). Rather, the government's restrictions on speech must remain reasonable and viewpoint neutral. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93, 113 S. Ct. 2141, 2147, 124 L. Ed. 2d 352 (1993). Not surprisingly, that includes religious speech and viewpoints. *Cf. Widmar v. Vincent*, 454 U.S. 263, 269, 277, 102 S. Ct. 269, 274, 278, 70 L. Ed. 2d 440 (1981) (content based restrictions on religious speech were not reasonable). The tour through the debates in this area is, and always has been, an extremely exciting excursion, but in the context of this case its relevance is equally exiguous. In fact, the policy at hand does not key on the viewpoint of the speaker at all.

A careful reading of the policy makes it clear that what the City has decreed is that an event cannot directly benefit a religious organization. So, for example, if a religious organization put on a perfectly secular play for the entertainment of the public -- say "Pygmalion" -- and derived some benefit from that, consideration for support would be precluded at the threshold. That would not, one presumes, be because of the viewpoint of George Bernard Shaw or of the performers of the play. It would be because a religious organization was deriving direct support from it. On the other hand, if a secular non-profit organization put on a prayer

program, even one solely and generally Christian, consideration for support would not be precluded. Certainly it could not be said that something as broad as a general chiliastic prayer would directly support any religious organization. Again, the lack of a threshold exclusion would not depend on the viewpoint of the speakers. In short, I think it is a mistake to fassick in the fields of freedom of speech. What we must do, instead, is turn our gaze on the hostility to religious organizations which is expressed by the policy in question.

As I have written before, "the Supreme Court [has] reminded us that laws of general application do not run afoul of the religion clauses; rather, those clauses assume and require an evenhanded neutrality both toward and on behalf of religious belief." *Goehring v. Brophy*, 94 F.3d 1294, 1306-07 (9th Cir. 1996) (Fernandez, J., concurring); *see also Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1470 (9th Cir. 1995) (Fernandez, J., concurring and dissenting) ("I . . . applaud the majority's overall analysis, which ultimately looks upon the establishment clause as a kind of equal protection clause . . . ."). But hostility is obviously anathema where neutrality is required. As the Supreme Court has cogently put it, "government may not . . . impose special disabilities on the basis of religious views or religious status." *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 877, 110 S. Ct. 1595, 1599, 108 L. Ed. 2d 876 (1990). While government regulations and programs may interfere with the particular beliefs of some citizens, the religion clauses do not bar "application of a neutral, generally applicable law to religiously motivated action." *Id.* at 881, 110 S. Ct. at 1601. Of course, it must be admitted that some laws which affect religion might be unconstitutional, even though they are neutral, but that is simply because they would be unconstitutional anyway -- for example, a law restricting

religious speech may well be unconstitutional because it is restricting speech, and it would be just as unconstitutional if the speech were not religious. *See id.* at 881-82, 110 S. Ct. at 1601-02; *see also Board of Educ. v. Barnette*, 319 U.S. 624, 634-642, 63 S. Ct. 1178, 1183, 1187, 87 L. Ed. 1628 (1943) (Jehovah's Witnesses children are not required to participate in flag salute. That does not "turn on one's possession of particular religious views;" it turns on First Amendment limitations which preclude governmental invasion of "the sphere of intellect and spirit."). But I digress. The law at hand is not some apparently benign enactment that happens to touch on someone's religious beliefs. It is, instead, a law aimed directly at religious organizations as such.

In that respect, the policy in question is more like the law that confronted the Supreme Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). There the target was really a single religion, but the government is no more benignant when it targets all religions. As Justice Kennedy said:

> In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice . . . . A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.

Id. at 531-32, 113 S. Ct. at 2226. And the Court went on to point out that:

> A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests.

Id. at 546, 113 S. Ct. at 2233 (citation omitted).

Of course, I recognize that the policy in question here does not impose a direct restriction on religious organizations; it simply denies a benefit that is available to virtually everyone else. To my mind, that is a distinction without a difference. It may well be that the government has a great deal of discretion when it grants benefits, and also attempts to distance itself from religion and the religious traditions of the American people. But as the Supreme Court has said, any state interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution . . . is limited by the Free Exercise Clause . . . ." *Widmar*, 454 U.S. at 276, 102 S. Ct. at 277.

While it has never been called upon to rule directly on the question, the Court has often expressed its incredulity at any suggestion that the Establishment Clause prohibits the extension of general public benefits to religious groups. That feeling is a recurrent theme. As the Court has often stated in varying ways, were it otherwise, "a church could not be protected by the police and fire departments, or have its public sidewalks kept in repair." *Roemer v. Board of Pub. Works*, 426 U.S. 736, 747, 96 S. Ct. 2337, 2345, 49 L. Ed. 2d 179 (1976); *see also Widmar*, 454 U.S. at 274-75, 102 S. Ct. at 277; *cf. Walz v. Tax Comm'n*, 397 U.S. 664, 672-75, 90 S. Ct. 1409, 1413-15, 25 L. Ed. 2d 697 (1970) (granting of tax exemptions

to churches does not violate the Establishment Clause any more than granting police and fire protection does).

But the City in its anxiety to avoid establishment problems has done just what the neutral demands of the religion clauses refuse to allow; it has run afoul of the Free Exercise Clause while it was at it. The City has done something very like denying police and fire protection to churches. It has allowed all other non-profit organizations (except those that it already subsidizes) to cross the threshold that gives them the possibility of participation in a fund which allows the use of city facilities and services at no additional cost, but it has excluded religious organizations from those benefits. It is as if the City charged religious organizations, and only religious organizations, when firemen or policemen came to their facilities, or for the repair of sidewalks, or for the use or cleaning of roadways. That cannot be and is not constitutional. As the Supreme Court said over 50 years ago:

> [S]uch is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

Everson v. Board of Educ., 330 U.S. 1, 18, 67 S. Ct. 504, 513, 91 L. Ed. 711 (1947). The City's policy does handicap religious organizations by refusing to treat them in the way that it treats all other non-profit organizations.[1]

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[1]I recognize that for us in the lower courts *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), still walks, or stalks, the land.

(continued...)

Religious organizations are not cankers on an otherwise healthy body politic. On the contrary, they tend to infuse us with all that is best in human nature and history, and they help prevent our democracy from becoming a kakistocracy. They should not be treated with hostility out of bigotry,[2] or out of misguided constitutional affection, or out of fear of offending someone. They should be treated with neutrality. The Supreme Court has said that government can sometimes act with a "benevolent neutrality." *Walz*, 397 U.S. at 676, 90 S. Ct. at 1415. It has never suggested that government can act with a malevolent one. The blessings of our Constitution do not stop

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[1](...continued)
See Bollard v. California Province of the Soc'ty of Jesus, 196 F.3d 940, 948 (9th Cir. 1999); *cf. Lamb's Chapel*, 508 U.S. at 398 400, 113 S. Ct. at 2149-50 (Scalia, J., concurring). But the *Lemon* test surely does not save this ordinance, for, if anything, the ordinance does inhibit religion by discriminating against religious organizations. *See Lemon*, 403 U.S. at 612, 91 S. Ct. at 2111. And if we ask, instead, if the Establishment Clause would be violated were it not for the threshold discrimination provision, the answer is no. The policy, in general, has a secular purpose, would not primarily advance or inhibit religion, and would not entangle government with religion. *Id.* at 612-13, 91 S. Ct. at 2111. Nor, by the way, is there any "realistic danger that the community would think that the [City] was endorsing religion." *See Lamb's Chapel*, 508 U.S. at 395, 113 S. Ct. at 2148. Finally, the statement in the application for benefits form that requires an applicant to acknowledge the City's contribution of services makes no difference because every recipient of those services must so acknowledge. If the statement did present a problem, I hardly think that the City can place a tarnkappe over the policy's reification of hostility at the threshold by adding that requirement. The concrete fact of improper discrimination against religious organizations remains quite visible.

[2]*See Mitchell v. Helms*, 530 U.S. 793, 120 S. Ct. 2530, 2551-52, 147 L. Ed. 2d 660 (2000).

short of religion.

Thus, I respectfully dissent.

KLEINFELD, Circuit Judge, with whom WARDLAW, Circuit Judge, joins, dissenting:

I respectfully dissent. Before denying a permanent injunction, the district court should have obtained additional evidence and made findings of fact.

Tucson has a city park and band shell, generally available to all organizations, including religious organizations, for their events. For most non-profit organizations, if the event serves any of a broad range of civic goals, the city waives charges that it would otherwise impose for in-kind services. The charges are for such municipal services as "refuse containers, street sweeping, . . . police services . . ." and use of the sound system at the band shell. The city does not write checks to the organizations; what is at issue is whether it demands checks from them. The city's written policy denotes three situations where the charges are not waived: (1) events hosted by organizations the city otherwise funds; (2) events put on by organizations allowed to occupy city property without paying rent; and (3) "events held in direct support of religious organizations."

The record includes results of applications to waive charges for only one of the preceding years, 1995-96. The funding record shows that requests were made for 26 events, and granted for 23. The ones turned down were the "Casa Car Show," the "Sister Cities Fund Raiser," and the "Fun Day In the Park." Nothing in the record says why any of these were rejected. It may be that the car show was commercial, and that the sister cities and fun day events were sponsored by

organizations otherwise funded by the city or using city offices rent-free. We simply do not know. Nor do we know what the city means by its exclusion of funding for "events in direct support of religious organizations" or how the exclusion applies here. The majority believes that the very fact that some applications are denied is enough to decide this case.[1] But this is not enough.

What we do not know matters to the outcome. For that reason, we should vacate the judgment and remand for an evidentiary hearing prior to issuance or denial of a permanent injunction. This record allows for either of two possibilities requiring opposite results. The first possibility is that the city is selective in what events it waives fees for, assuring that the events advance a viewpoint which the city endorses. If so, the city is entitled,[2] and probably required, to deny the waivers for religious events. Or it may be that everyone gets a waiver for these routine municipal expenses except for events that promote religion. If so, that violates the core principal of neutrality required by the First Amendment,[3] and the plaintiffs are entitled to prevail.

The majority opinion says we must "draw lines, sometimes quite fine, based on the particular facts of [this] case" to

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[1]Maj. Op. at 1079.

[2]*See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 586-88, 141 L. Ed. 2d 500, 118 S. Ct. 2168 (1998).

[3]*See Mitchell v. Helms*, 530 U.S. 793, 120 S. Ct. 2530, 2541-42, 147 L. Ed. 2d 660 (2000); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 839, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995); *see also*, *Rosenberger*, 515 U.S. at 846 (O'Connor, J. concurring) (summarizing principle of neutrality toward religion).

conclude that "this case involves significant factual differences from *Rosenberger*."[4] How would we know enough to draw fine lines based on the facts? We do not know the facts. There are no findings of fact. For all we know, the city is entirely unselective in practice. If so, the fund takes on a character similar to that of the quasi-public forum in *Rosenberger*. The government cannot restrict access to a public forum on account of the speaker's religious message.[5] It makes no difference that municipal expenses and personnel are involved in maintaining the space. Government disbursements to organizations supporting a particular sectarian religious viewpoint are required by neutrality rather than barred by the Establishment Clause under *Rosenberger*,[6] and held not to violate the Establishment Clause in *Mitchell v. Helms*.[7] Discriminating against religious institutions by denying them a non-discretionary benefit available to a broad class that otherwise includes them violates the Free Exercise and Equal Protection Clauses.[8] Our Constitution no more permits a government

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[4]Maj. Op. at 1078.

[5]*See Rosenberger*, 515 U.S. at 829-30.

[6]*See id.*

[7]*See* 530 U.S. 793, 120 S. Ct. 2530, 2541, 147 L. Ed. 2d 660 (2000) ("If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.").

[8]*See id.*; *see also, Widmar v. Vincent*, 454 U.S. 263, 274-75, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981).

policy of anti-clericalism than favoritism.[9] The Free Exercise Clause is not mere surplusage. Making religious groups pay for what everyone else gets for free is like charging the churches but no one else when they call for police or fire department assistance.[10] Such interference with the free exercise of religion, by imposing a discriminatory burden, would be as plainly unconstitutional as government selection of preferred churches to whose treasuries it would contribute.

If the government makes a public forum available without discriminating against religious speech there could also not be any appearance of endorsement. A non-discretionary government benefit that goes to all non-profits does not violate the Establishment Clause if it includes religious institutions.[11] Neutrality eliminates the potential establishment clause issue.[12] Nor would there be any endorsement inference. The informed observer would know that all non-profits receive the fee waiver and that there is nothing special about the fact that the Gentalas' organization received the waiver. Passersby who see municipal

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[9]*See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993); *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 877, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18, 91 L. Ed. 711, 67 S. Ct. 504 (1947).

[10]*Cf. Roemer v. Board of Pub. Works*, 426 U.S. 736, 747, 49 L. Ed. 2d 179, 96 S. Ct. 2337 (1976).

[11]*See Mitchell*, 120 S. Ct. at 2541; *Rosenberger*, 515 U.S. at 829-30; *Walz v. Tax Comm'n*, 397 U.S. 664, 672-75, 25 L. Ed. 2d 697, 90 S. Ct. 1409 (1970) (finding constitutional statute exempting from taxation real property used exclusively for religious purposes).

[12]*See id.*

employees at the municipal band shell during the prayer event would no more infer a theological endorsement than they would if they were to see municipal firemen pointing hoses at a church fire.[13]

On the other hand, it may be that the city is selective, routinely denying the waiver to events or groups it feels do not "celebrate and commemorate the historical, cultural and ethnic heritage of the City" or do not "instill civic pride." If so, the waiver program would not be a public forum at all. Instead, it would be like the grant program in *Finley* -- discretionary government funding subject to selective criteria.[14] In that case the city could properly exclude religious organizations from the waiver program, regardless of whether the waivers would violate the Establishment Clause, simply because the religious nature of the events did not promote the city's message of inclusion. And granting a waiver to the Gentalas under these facts would likely violate the Establishment Clause.[15]

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[13]The majority notes that "the Fund supported other events sponsored by religiously-affiliated organizations when the events did not directly benefit the groups themselves, and events with religious themes sponsored by secular organizations" Maj. Op. at 1070 (footnote omitted). How is the passerby or even the "informed observer" to know the fine distinction apparently made (or at least attributed by the majority) between Gentala's request for funding and the city's funding of a fishing clinic sponsored by the Aid Association for Lutherans (not "in direct support") or a depiction of the birth of Christ (not "sponsored by a religious group")?

[14]*See Finley*, 524 U.S. at 586-88.

[15]*See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 120 S. Ct. 2266, 2278, 147 L. Ed. 2d 295 (2000); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384, 395, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993); *see* (continued...)

Because the record does not enable us to base a decision on the necessary factual predicate, we should vacate and remand for an evidentiary hearing and findings of fact. Therefore I dissent.

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[15](...continued)
also, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 773-74, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (discussing endorsement inquiry in Establishment Clause cases).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

PATRICIA E. GENTALA and ROBERT A. GENTALA, Plaintiffs,	) NO. CV-97-327 TUC-FRZ
vs.	) **ORDER**
CITY OF TUCSON, Defendant.	)

[Filed Sept. 30, 1997]

I. BACKGROUND

Plaintiffs are active sponsors and organizers of the Tucson National Day of Prayer.[1] Plaintiff Patricia E. Gentala (Pat Gentala) chairs the local National Day of Prayer Committee. For the 1997 event, the Committee obtained permits from the city of Tucson (the City) to hold a prayer event, open to the public, at the City's Reid Park in the Demeester Outdoor Performance Center (the Bandshell). The event was carried out

[1]The National Day of Prayer is a national event established by an act of Congress in 1952. Since 1988, the event has occurred annually on the first Thursday of May each year. Plaintiffs describe the event as one where people of "all faiths" gather to pray for the nation and its leaders. However, Defendants point out that members of the organization, National Day of Prayer, are required to be Christian and the National Day of Prayer Task Force is described as "firmly rooted in the Judeo-Christian tradition." (See Exhibits E and F to Declaration of Pat Gentala).

as planned, a few songs were sung and the several hundred persons attending the event were led in prayer by the nine pastors from different churches. However, the City refused to support the event with funds from its Civic Events Fund, pursuant to its Civic Event Policy.[2] That refusal is the source

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[2]The City of Tucson Civic Event Policy Statement and Evaluation Criteria, Exhibit A to Complaint. The policy states in part:

> Policy. The Mayor and Council encourage and support Civic Events that: celebrate and commemorate the historical, cultural and ethnic heritage of the City and the nation, or increase the community's knowledge and understanding of critical issues, with the purpose of improving citizens' quality of life; generate broad community appeal and participation; instill civic pride in the City, state, or nation; contribute to tourism; or are identified as unique community events . . .
>
> Conditions of Receiving City Support. The following conditions must be met before an event may be considered for City support through the Civic Event process.
>
> 1. Events must be sponsored by non-profit organizations, or by individuals conducting the events on a non-profit basis (with fund-raising proceeds used for a community benefit). However, the following types of events are not eligible for Civic Event support:
>
>   a. events sponsored by organizations that receive City funding through the Outside Agency process;
>
>   b. events sponsored by organizations that use the City property on a rent-waived ($1/yr) basis;
>
>   c. events held in direct support of religious organizations.
>
> 2. All events must be open to the public and must not discriminate against patrons in any manner.
>
> 3. Event sponsors agree to:
>
>   a. Maintain a financial accounting of the event, and upon request

(continued...)

of the controversy.

Pursuant to city ordinance Tucson Code § 21-14 and § 21-16, specific fees are charged for the use of event equipment and park bandshells and other facilities owned by the City of Tucson. However, grants are available to subsidize part or all of the cost of an event. The City of Tucson maintains a Civic Events Fund consisting of City moneys from the general fund appropriated by the City of Tucson Mayor and Council each year. The funds are budgeted in the City's general government budget which consists of tax revenue, user fees, and other sources of recurring and non-recurring revenue. Persons who sponsor an event at Reid Park may request a grant from the Civic Events Fund through the Civic Events Subcommittee (the Subcommittee). If approved, the sponsor may request services from the City departments, such as the Parks and Recreation or Sanitation Departments, to support the event. Instead of billing the sponsors for these services, the Department charges the Civic Events Fund. Civic events which are deemed eligible and receive City funding are advertised as receiving City funding.

The Civic Events Fund is intended to encourage and support civic events which celebrate the City's heritage, increase

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[2](...continued)

provide City staff prompt access to such financial records and any additional financial information about the sponsoring organization.

b. Obtain liability insurance for their event, in the amounts determined by the City's Risk Manager (791-4728).

c. Contact Development Services (Civic Event Coordinator, 791-5550) at least 60 days before the event to obtains assistance in coordinating the event, including obtaining the appropriate inspections, acquiring the necessary permits, and coordinating any City services to be received . . .

knowledge and understanding of issues which will improve the citizens' quality of life, generate broad community appeal and participation, contribute to tourism, or which are identified as unique community events. All non-profit organizations are eligible to use Civic Event grant money. However, two groups are specifically excluded: organizations which already receive City money (through the "Outside Agency" program or through a rent-waived basis) and any organization seeking to hold an event directly in support of a religious organization. Grant of the money is discretionary and event sponsors who are otherwise qualified may be denied funding if the Subcommittee feels the event itself does not meet the Civic Events Guidelines. Events seeking less than $1,500 in funding may be approved by the Subcommittee, but a request for anything more than that is referred to the Mayor and Council for approval. If an event is refused funding, appeal to the Mayor and Council is automatic.

In addition, all organizations using City parks and smaller facilities like bandshells are required to obtain insurance in the amount of $300,000. For the Tucson Community Center and other large city facilities, insurance in the amount of $1,000,000 is required. However, the City's risk manager has discretion to reduce the required coverage from $1,000,000 to $300,000. In some situations, the City may contribute funds to pay for event insurance where the event could not otherwise proceed. (Affidavit of City Risk Manager Terry W. Anderson at 17).

On April 16, 1997, Pat Gentala applied to the City for public event-related services in support of the National Day of Prayer. In particular, Gentala requested stage, audio, and lighting services at the Bandshell. The application for the funding stated that pastors from nine different churches would lead participants in prayer for local, state, and national issues and

that the sponsoring organizations' purpose was to organize an annual gathering of Tucson Christians to observe the National Day of Prayer. The Tucson Association of Evangelicals and the National Day of Prayer Committee were listed as co-sponsors of the event. Plaintiffs obtained a permit to use the Bandshell. However, the Subcommittee refused to fund the event under the Civic Events Policy upon determination that the National Day of Prayer event would directly support a religious organization.

The Mayor and Council reviewed the Subcommittee's decision at its study session May 12, 1997, and heard testimony from Plaintiff Bob Gentala who stated his belief that it was unfair for the city government to systematically prefer secular activities to religious activities. Mayor Miller expressed his support for the event and the sponsors, but ultimately agreed with the Subcommittee that the funding would be inappropriate for reasons of constitutional law and sponsorship of religion.

Plaintiffs filed this suit on May 27, 1997, requesting injunctive and declaratory relief against the City. Plaintiffs bring suit under 42 U.S.C. § 1983, alleging that the City's Civic Event Policy is unconstitutional because it excludes religious groups from applying for Civic Event Funding. Plaintiffs complain that the policy is unconstitutional on its face and as applied to them. Plaintiffs allege violations of the First Amendment's Free Speech Clause, Establishment Clause, and Free Exercise Clause, and a violation of the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb, et seq.[3]

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[3]The Court observes preliminarily that the Religious Freedom and Restoration Act has been held unconstitutional by the Supreme Court, and accordingly, the Court does not consider the parts of the claim is stated under that Act. City of Boerne v. P.F. Flores, 117 S.Ct. 2157, 38 L.Ed.2d

(continued...)

Plaintiffs request a preliminary and a permanent injunction restraining Defendants from excluding plaintiffs and other religious groups from eligibility for public event services under the Civic Event Policy. Plaintiffs further request a Declaratory Judgment declaring that the City Civic Event Policy is unconstitutional. A hearing on the Motion for Preliminary Injunction was held August 8, 1997. Plaintiffs motioned at that time to consolidate the motion for preliminary injunction with the trial on the merits pursuant to Rule 65, Fed.R.Civ.P.

II. STANDARD FOR PRELIMINARY INJUNCTION

In this circuit, a party seeking preliminary injunctive relief must meet one of two tests. Under the first, a court may issue a preliminary injunction if it finds that: 1) the moving party will suffer irreparable injury if injunctive relief is not granted, 2) the moving party will probably prevail on the merits, 3) in balancing the equities, the non-moving party will not be harmed more than the moving party is helped by the injunction, and 4) granting the injunction is in the public interest. Stanley v. Univ. of Southern Cal., 13 F.3d 1313, 1319 (9th Cir. 1994).

Alternatively, a court may issue a preliminary injunction if the moving party demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor. This standard has also been described as a sliding scale wherein the movant must show either 1) a likelihood of success on the merits and the possibility of irreparable injury, or 2) the existence of serious questions going to the merits and the balance of hardships tipping in the

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[3](...continued)
624, 65 USLW 4612 (1997).

movant's favor. MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 516 (9th Cir. 1993). However, even if the balance of hardships tips decidedly in favor of the moving party, it must be shown as an irreducible minimum that there is a fair chance of success on the merits. Stanley, 13 F.3d at 1319. Finally, there is one additional factor to be weighed. In cases such as the one here, where a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo pendente lite, courts should be extremely cautious about issuing a preliminary injunction. Id.

Plaintiffs seeks a preliminary injunction, asserting that they have a strong likelihood of success on the merits and that any deprivation of their first amendment rights is sufficient to work an irreparable harm. The City opposes Plaintiff's motion for preliminary injunction, arguing that, as a matter of law, Plaintiffs are not likely to prevail on the merits and, as a matter of fact, there is no risk of irreparable injury to Plaintiffs.

III. FREE SPEECH ANALYSIS -- LIKELIHOOD OF SUCCESS ON THE MERITS

A. First Amendment's Free Speech Clause and Establishment Clause

Cases such as this one illustrate the confusing intersection between the First Amendment's Speech Clause and Establishment Clause.[4] The First Amendment's Free Speech Clause prohibits the government from regulating speech based

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[4] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." U.S. Const. Amend. I.

on its substantive content or the message it conveys. Finley v. National Endowment for the Arts, 100 F.3d 671, 681 (9th Cir. 1996), petition for cert. filed, 66 U.S.L.W. 3171 (U.S. Aug. 29, 1997) (No. 97-371) (citing Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 115 S.Ct. 2510, 2516, 132 L.Ed.2d 700 (1995)). This protection extends to religious speech and expression, including prayer and worship. Widmar v. Vincent, 454 U.S. 238, 269, 102 S.Ct. 269, 274, 70 L.Ed.2d 440 (1981). The First Amendment's Establishment Clause prohibits "sponsorship, financial support, and active involvement of the sovereign in religious activity." Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 771, 93 S.Ct. 2955, 2964, 37 L.Ed.2d 948 (1973). In one sense then, the Establishment Clause mandates that the government engage in some analysis of "content" so that it does not unwittingly offend the Constitution.[5] However, in order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, a government must show that its regulation is necessary to serve

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[5]Professor Charles Fried describes this dilemma:

> But this mode of analysis is distinctly peculiar: the integrative and rationalizing functions of doctrinal analysis must shrink from admitting that the Constitution actually commands two contradictory things. Rather, the boundaries of the two must be set, and cases must be assigned to one or the other region. Beneath this doctrinal effort, to be sure, is the Court's awareness of the opposing tendencies, and this awareness informs the interpretive task. But the form of the solution cannot -- without risking confusion -- be an acknowledgment that an action violates one prohibition but that is justified by the need to avoid violating another.

Charles Fried, Forward, Revolutions? 109 Harv.L.Rev. 13, 70 (1995).

a compelling state interest and is narrowly drawn to achieve that end. Widmar, 102 S.Ct. at 274. "There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restriction on speech." Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753, 757, 115 S.Ct. 2440, 2445, 132 L.Ed.2d 650 (1995).

The city defends its policy as one which is necessary to respect the Establishment Clause, while Plaintiffs argue that it violates both the Establishment Clause and Free Speech guarantees.

1. Free Speech Analysis

Plaintiffs argue that the City's policy violates their right to Freedom of Speech because it 1) constitutes unconstitutional content-based and view-point based discrimination; 2) is unconstitutionally vague; 3) unconstitutionally restricts free speech in a public forum; 4) is unconstitutionally overbroad; and 5) is subject to the unbridled discretion of the City Risk Manager. It is undisputed that the Civic Event Policy flatly denies any religious group from consideration for Civic Event Funding which would directly support a religious group. The parties also agree that Reid Park is a traditional public forum. (Plaintiff's Motion for Preliminary Injunction at 9; Defendant's Memorandum of Law in Opposition at 6). However, while Plaintiffs assert that the City must make funds available for the National Day of Prayer event in order to respect the First Amendment's guarantee of free speech, Defendants respond that the City's denial of funding for the event does not arise to a denial of the use of the forum.

The City's sole basis for denial of Plaintiffs' application for

funding is acknowledged to be the fact that the National Day of Prayer is a religious event, involving religious expression and directly supporting religious groups. Content-based restriction on speech is presumptively unconstitutional. Finley, 100 F.3d at 681 (9th Cir. 1996). Furthermore, in a traditional public forum, "a state's right to limit protected expressive activities is sharply circumscribed: it may impose reasonable, content-neutral time, place, and manner restrictions . . . only if such restriction is necessary to serve a compelling state interest." Pinette, 115 S.Ct. at 2446. In a designated forum, "[t]he government bears a particularly heavy burden in justifying viewpoint-based restrictions in designated public forums." Church on the Rock, 84 F.3d 1273, 1279.

Defendants maintain that the City's policy is a valid restriction of government funds made in respect of the Establishment Clause. In support of this assertion, Defendant cites Fordham University v. Brown, 856 F. Supp. 684 (D.D.C. 1994). In that case, Fordham University sued the United States Department of Commerce, alleging that denial of the University's application for funding of certain broadcast facilities for its radio station violated its First Amendment rights. The court held that the government's policy precluding funding for sectarian practices (in this case, broadcasting of a mass) was not viewpoint-based discrimination.

> [T]he issue is not whether WFUV may broadcast freely or even whether its listeners . . . may worship as they choose, but whether the Government may seek to follow the parameters of the Establishment Clause in funding certain broadcasts.

Fordham, 856 F. Supp. at 690. At the hearing on the motion for preliminary injunction, Plaintiffs argued that Fordham was

overruled, at least implicitly, by Rosenberger and that the analysis in Fordham is based upon "old" law, whereas the "new" law is stated in Finley, Rosenberger, and Pinette.

In Finley, the Ninth Circuit dealt with similar issues of government funding and Free Speech. The court observed:

> As the Court explained in Rust, "when the government appropriates public funds to establish a program, it is entitled to define the limits of that program." . . . Government funding does not invariably justify government control of the content of speech, however. In Rust, the Court cautioned that its holding would not apply to public fora or to universities, which occupied "a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to expenditures of Government funds is restricted." Rust, 500 U.S. at 200, 111 S.Ct. at 1776. In addition, Rust and Rosenberger identify two related contexts in which the government may subsidize speech only if it does so in a way that is viewpoint-neutral. Neutrality may be required because the area is a "traditional sphere of expression," Rust, 500 U.S. at 200, or because the government has declared its intention to "encourage a diversity of views from private speakers." Rosenberger, ___ U.S. at ___, 115 S.Ct. at 2519. Both approaches support the district court's conclusion that government funding of the arts, in the circumstances in this case, must be viewpoint neutral.

Finley, 100 F.3d at 681, (citing Rust v. Sullivan, 500 U.S. 173, 11 S.Ct. 1759, 114 L.Ed.2d 233 (1991)).

As these cases make clear, a city may define the parameters

of a tax-funded program with the aim of respecting the Establishment Clause. As a general rule, however, a city may not discriminate among speakers in traditional public fora on the basis of the content of their speech. An exception exists where the government regulates content out of respect for the Establishment Clause, but that regulation must be narrowly drawn.

2. Rosenberger v. Rector & Visitors of Univ. of Va.

The parties fundamentally disagree on the question of whether the Civic Event Fund should be included in the definition of "public fora." In arguing that it should be, Plaintiffs rely heavily on the recent Supreme Court case of Rosenberger v. Rector & Visitors of Univ. of Va., 115 S.Ct. 2510 (1995). In that case, the University of Virginia maintained a Student Activity Fund (SAF) which reimbursed the printing costs for certain student publications. A student group, called "Wide Awake Productions," which had been recognized as a non-religious organization on campus, submitted a request against the SAF for reimbursement of printing costs for its magazine, "Wide Awake: A Christian Perspective at the University of Virginia." The Student Council, and ultimately the Dean of Students, denied the funding. The student group filed suit alleging that the university's refusal to fund Wide Awake violated their right to free speech and press.

Because the SAF fund literally provided the paper and ink for the expression of various view points at the university, the Court reasoned that the fund was a forum, albeit, "more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable." 115 S.Ct. at 2517. In response to the university's concern that funding the paper would run afoul

of the Establishment Clause, the Supreme Court explained:

> It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups which use meeting rooms for sectarian activities, accompanied by some devotional exercises. . . . The government usually acts by spending money. Even the provision of a meeting room, as in Mergens and Widmar, involved government expenditure, if only in the form of electricity and heating costs. The error made by the Court of Appeals, as well as by the dissent, lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient.

115 S.Ct. 2510, 2523 (1995) (Citations omitted).

Thus, in Rosenberger, the Supreme Court found the university policy violated the Free Speech guarantees of the First Amendment, despite the school's protest that the policy was valid under the Establishment Clause. In that case, the nature of the benefit provided was access; to deny funds was to deny access to the forum. The facts at hand appear similar to those in Rosenberger, in so much as the fund is related to the forum. However, the instant case must be distinguished from Rosenberger on several points which raise valid concerns implicating the Establishment Clause.

First, there were no religious groups or organizations involved in Rosenberger as there are here. Instead, there was a student group which did not have status as a "religious" group either as the Supreme Court has defined that term or as the University of Virginia defined it. 115 S.Ct. at 2524. Thus,

Rosenberger is of limited guidance to the Court in this case, where it is undisputed that the Plaintiffs represent religious groups sponsoring the National Day of Prayer.

Second, the Rosenberger case involved a fund of money gathered from a fee paid by students, rather than funding from the general taxes paid by the public. Accordingly, the Supreme Court found in Rosenberger a degree of removal from direct state funding that is not present in this case. The Court carefully pointed out: "We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity . . . [N]o public funds flow directly to WAP's coffers." 115 S.Ct. at 2523. In the present case, it is undisputed that the Civic Events Fund is created with general tax money and that a bill for the civic event services is prepared and presented against that fund. Thus, the case is distinguishable from Rosenberger, but quite similar to a hypothetical case anticipated by the Rosenberger Court:

> It is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse.

115 S.Ct. 2510, 2524.

Finally, in the context of Free Speech clause analysis, the Court concludes that the Civic Events Fund is distinguishable from the SAF fund in Rosenberger. In Rosenberger the Supreme Court found the SAF amounted to a "metaphysical" forum. That analogy does not extend to this case. While Reid Park and the Demeester Outdoor Performance Center are certainly public forums, the Civic Events Fund is not in and of itself a "forum." Instead, payments from the Civic Events Fund

represent an extraordinary expenditure by the City.

This conclusion gathers weight from the Supreme Court's holding in Widmar that the benefits extended to a religious group by use of a public school classroom after hours did not violate the Establishment Clause because they were "incidental" benefits.[6] Similarly, the Rosenberger Court noted that the government usually acts by spending money, but emphasized that a court should focus upon the nature of the benefit received by the recipient. The Court reads Rosenberger and Widmar as precluding an extraordinary expenditure taken from public taxes and spent in direct support of a religious group.

Plaintiffs have cited no case holding that general tax funds

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[6]The Court wrote:

> We are not oblivious to the range of an open forum's likely effects. It is possible -- perhaps even foreseeable -- that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion.

Widmar, 102 S.Ct. at 273, 454 U.S. at 276 (citing Nyquist, 413 U.S. at 771, 93 S.Ct. at 2964). Similarly, the Supreme Court majority wrote in Lamb's Chapel v. Center Moriches School Dist., 113 S.Ct. 2141, 2148 (1993), wrote:

> The showing of this film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had been repeatedly used by a wide variety of private organizations. Under these circumstances, as in Widmar, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.

must be made available for the direct support of religious groups; Rosenberger certainly does not so hold ("Our decision, then, cannot be read as addressing an expenditure from a general tax fund." 115 S.Ct. at 2522) and the Establishment Clause bars such a holding. Similarly, Finley, which held that the National Endowment for the Arts could not discriminate on the basis of content in its grant program, did not deal with a religious group or with the Establishment Clause.

Private religious expression in public forums is completely protected by the First Amendment. The Supreme Court noted in Pinette:

> We have twice previously addressed the combination of private religious expression, a forum available for public use, content-based regulation, and a State's interest in complying with the Establishment Clause. Both times, we have struck down the restriction on religious content.

Pinnette, 115 S.Ct. at 2445 (citing Lamb's Chapel v. Center Moriches School Dist., 113 S.Ct. 2141 (1993) and Widmar). Nonetheless, the nature of the benefit in both Lamb's Chapel and Widmar was "incidental."[7] Those cases involved the use of space in existing public buildings by religious groups and were ultimately decided on Free Speech grounds. While Rosenberger extended the holdings of Widmar and Lamb's Chapel from "space to money," Finley, 100 F.3d at 686 (Judge Kleinfield, dissenting), Rosenberger did *not* deal with a plaintiff representing religious groups or with benefits flowing directly to a religious group. In this case, Plaintiffs represents religious groups seeking tax dollars to support a religious event.

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[7]See footnote 6, supra.

Therefore, the dispositive inquiry in this case must be made under the Establishment Clause. As the Supreme Court recognized in the same term it decided Rosenberger, compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech. Pinette, 115 S.Ct. at 2445, 515 U.S. at 757 ("There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech").

B. Unconstitutional Prior Restraint

Additionally, the Court rejects Plaintiffs' argument that the City's policy requiring insurance is an unconstitutional grant of unfettered discretion to limit Free Speech. To pass constitutional muster, a regulation cannot give a government official broad discretion over speech issues. Instead, there must be defined standards for applying the law. The risk this protects against is that the official might use his discretionary power to prohibit or burden the dissemination of ideas that he disagrees with or which are politically unpopular. In Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992), Forsyth County required a $1,000 permit for any parade, march, or rally, but the county administrator could adjust the fee to meet the necessary expenses of police and other services. The policy was invalid both as "unfettered discretion" and as content based discrimination because, in theory, the administrator could adjust the cost based on the popularity of the subject matter at issue, with unpopular subjects costing more in police protection. The county administrator in Forsyth was granted discretion to "adjust the amount to be paid in order to meet the expense incident to the administration of the ordinance and the

maintenance of public order." Id. at 126-27.

In contrast, the City of Tucson's risk manager, Terry W. Anderson, holds no discretion to arbitrarily increase the cost of insurance for an event. However, the opposite is true -- he can reduce the cost of insurance where it is necessary or desirable to do so. Plaintiffs do not allege that the risk manager has arbitrarily reduced the cost of insurance for some groups in favor of others or that, if he were to do so, it would chill free speech. Anderson's affidavit indicates that if the sponsor of an event cannot obtain adequate coverage, or has coverage less than the minimum required, the required coverage may be reduced down one step unless the event presents "unique hazards." He avers that this happens on average twice a year. He also avers that the City's risk classifications do not consider the content of the speech. Rather, they are based on the size of the event and the facility. Large events, such as those using the convention center require $1,000,000 in insurance while smaller events such as car show and company picnics require $300,000.

The City's policy in this case is distinguishable from that in Forsyth County. In this case there is no unfettered discretion to increase the fee and so there is no risk of unconstitutional burdening of Free Speech. Accordingly, the Court rejects the Plaintiffs' arguments to the contrary.

IV. ESTABLISHMENT CLAUSE ANALYSIS

1. Establishment Clause

The traditional test applied in Establishment Clause analysis was enunciated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). That case set out a three prong test for testing the constitutionality of a governmental action

under the establishment clause: 1) the challenged action must have a secular purpose, 2) it must have a primary effect that neither advances nor inhibits religion, and 3) it must not foster excessive entanglement with religion. The City properly observes that Lemon "still provides the starting point for any analysis under the Establishment Clause." (Opposition Brief at 16).[8] However, the more recent Supreme Court cases, in particular Rosenberger, suggest a broader approach to Establishment Clause and Free Speech cases. Therefore, although the City's policy may appear defensible based on the Lemon analysis, this Court looks further, inquiring into not only the "purpose and object of the governmental action in question" but also into "the practical details of the program's operation." Rosenberger at 2521. As stated by Justice O'Connor, "When bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified. The Court does only what courts must do in many Establishment Clause cases -- focus on specific features of a particular government action to ensure that it does not violate the Constitution."

Turning to the Lemon analysis, the Court finds that the City's policy clearly states a secular purpose.[9] The policy does not express support or hostility to religion, but seeks to promote events which reflect civic, cultural, ethnic, and historic themes

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[8]The Lemon test has suffered scathing criticism. Lamb's Chapel v. Center Moriches School Dist., 113 S.Ct. 2141, 2148-50 (1993) (Justice Scalia concurring in the judgment), but it has not been overruled. See id. at 2148, footnote 7 ("[T]here is a proper way to inter an established decision and Lemon, however frightening it might be to some has not been overruled").

[9]Footnote 2, supra.

related to the City of Tucson. In fact, religion is not mentioned in the policy statement. Accordingly, the first prong of the test is satisfied.

As to the second prong, the City argues that the policy does not have a primary effect of inhibiting religion, because religious groups have access to the forum, but not at taxpayers' expense. The Supreme Court has stated that "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." Rust v. Sullivan, 500 U.S. 172, 192, 111 S.Ct. 1759, 1772, 114 L.Ed.2d 233 (1991); see also Regan v. Taxation With Representation of Washington, 461 U.S. 540, 546, 103 S.Ct. 1997, 2001, 76 L.Ed.2d 129 (1983) ("We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State'"). In contrast:

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

Hunt v. McNair, 413 U.S. 734, 743, 93 S.Ct. 2868, 2874, 37 L.Ed.2d 923 (1973).

While the Ninth Circuit discussed a similar funding issue in Finley, where it directly addressed Rust and found the plaintiffs in the case were entitled to apply for funding from the National Endowment for the Arts (NEA), Finley did not involve plaintiffs seeking tax funding on behalf of a religious group. The artists suing in Finley therefore did not encounter the Establishment Clause as a possible bar to their claim and the

Ninth Circuit's analysis was not made in the context of the counterbalancing concerns of the Establishment Clause. Finley, 100 F.3d at 681-82. The court held: "Because the government has made no attempt to articulate a compelling interest served by the provision, § 954(d)(1) cannot survive scrutiny." Id. at 683.

By contrast, the city government here does assert a compelling interest. The City argues that the special funding requested by the religious groups in this case would have the primary effect of advancing religion by granting an extraordinary benefit from general tax funds to a religious group. It is important to note that Plaintiffs remain free to make use of the City of Tucson's facilities at their own expense, and have done so. Accordingly, the Court concludes that the primary effect of the law is not to "inhibit" the free exercise of religion.

As to the third prong, the City argues that the policy does not foster excessive entanglement with religion, but rather creates a bright line rule that no funding which would directly benefit a religious group is permitted. (Opposition Brief at pp. 18-20). Plaintiffs cite several examples of events which the City has funded and which appear to have religious overtones or to support a religious expression. The Court finds no evidence of impermissible entanglement of religion in the past funding practices of the Subcommittee.

In one of the two cases Plaintiffs cite, the City funded a traditional Christmas event called Las Posadas which commemorates through a procession the flight of Joseph and Mary and the baby Jesus into Egypt. Like the nativity scene which was the subject in Lynch v. Donnelly, 465 U.S. 68, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984), the traditional Las Posadas

event must be viewed "in the context of the Christmas season" as something far less than a purposeful effort to express governmental advocacy of a particular religious message. Id. 465 U.S. at 679, 104 S.Ct. at 1362. More to the point, the Las Posadas event was sponsored by the Tucson Festival Society and a public school and directly benefitted no religious organization. In distinction, the Subcommittee has declined to fund events with no religious message which were intended to raise funds for sectarian schools. Thus, the examples illustrate that the policy does not inquire into the content of the speech, but whether providing funding will have the effect of sponsoring religion.

While it is true that a government must avoid engaging in content-based discrimination of speech, it is equally true that a government must avoid advancing religion. Both requirements are expressed in the First Amendment and both are respected by the City's policy. The policy permits religious organizations to have unrestricted access to all of the facilities of the City without limitation on expression of religious viewpoints or the practice of religious prayer and worship, but declines to contribute money from public funds in direct support of religion. Accordingly, the Court concludes that the City's policy passes muster under the Lemon test.

Beyond the Lemon analysis, the answer to one core question is always dispositive: does the relationship of the State to the religious activity "[c]onvey a message of government endorsement or disapproval of religion"? Lynch v. Donnelly, 465 U.S. 668, 688, 104 S.Ct. 1355, 1367, 79 L.Ed.2d 604 (1984) (Justice O'Connor concurring). If the answer is yes, "a

core purpose of the Establishment Clause is violated." Id.[10] This "endorsement test" has not technically supplanted the Lemon analysis, but is a useful device for framing the inquiry into the "practical details" and "specific features" of a government program which the Rosenberger Court emphasized needed to be addressed. "The problem, like many problems in Constitutional law, is one of degree." Zorach v. Clauson, 343 U.S. at 314, 72 S.Ct. at 684.

Turning to the practical details and specifics, the Court finds unpersuasive the City's suggestion, made at the August 8, 1997 hearing, that an impermissible endorsement is inevitable because a special mention of the City's funding accompanies any advertisement of an event which is granted Civic Event Fund money. The City could just as easily advertise that it does not endorse the National Day of Prayer or any event. See Mergens, 496 U.S. at 252 (school could issue a disclaimer specific to the religious group). However, the City cannot so easily remedy the appearance of employees of the City of Tucson Parks and Recreation Department, paid from the City's budget, operating the lights and audio for a religious event. The large-scale support sought by the Plaintiffs would inescapably convey the impression that the City was engaged in a costly

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[10]Compare the language of School District of City of Grand Rapids v. Ball, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985) (Overruled in Agostini v. Felton, 1997 WL 338583) ("Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any -- or all -- religious denomination as when it attempts to inculcate specific religious doctrines." Id. at 387) to the language in Widmar v. Vincent, 454 U.S. 263, 274, 102 S.Ct. 269, 276, 70 L.Ed.2d 440 (1981) (effect was 'incidental" and not "primary" because it "does not confer any imprimatur of state approval on religious sects or practices").

joint-enterprise with a religious group for religious purposes. The cost of the 1997 National Day of Prayer event was over $1,000 and the Plaintiffs intend to increase the size of the event. When Civic Event Funding is provided, the bill for those costs is presented to the City, rather than the sponsors. If Civic Event Funding was provided to the National Day of Prayer, an impartial observer could conclude that the City was endorsing this religious activity. It would be exactly the case alluded to by the Rosenberger Court:

> It is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse.

115 S.Ct. 2510, 2524.[11]

As a matter of fact particular to this case, the Court also finds relevant the nature of the National Day of Prayer. The literature supporting this event takes a very deliberate stance with regards to the Establishment Clause:

> The Jeffersonian "separation between church and state," understood in support of the Declaration of Independence, means only that a church and the civil government are

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[11]The Court went on in the next lines to say:

> That is not a danger here, based on the considerations we have advanced and for the additional reason that the student publication is not a religious institution, at least in the usual sense of the term as used in our case law, and is not a religious organization as used in the University's own regulations. It is instead a publication involved in a pure forum for the expression of ideas, ideas that should be both incomplete and chilled were the Constitution to be interpreted to require that state officials and courts scan the publication to ferret out views that principally manifest a belief in a divine being.

115 S.Ct. at 2524.

> separate and distinct institutions. It does not mean government must be hostile toward religion or seek to eliminate religious content from public forums.

(Declaration of Patricia E. Gentala in Support, Exhibit E).

While the National Day of Prayer literature states that the Day of Prayer is for all faiths, it contradictorily declares also "The NDP Task Force provides promotional materials and sponsors events in-keeping (sic) with the Judeo-Christian traditions, since that represents our own background and that of more than 90 percent of the U.S. population." The literature highlights the role of Christianity and prayer in national life, American history, and American government.

> The 1997 NDP theme is "In God We Trust." Reflecting the engraved commitment of America found on all U.S. currency since the last act signed by President in the mid 1800's . . . . While some may trust in finances, education, environment, or military prowess, it is our prayer that during this National Day of Prayer, America will again remember the trust that made this nation great.

Id. The broadly implied message is that Judeo-Christian religion enjoys, or should enjoy, official status and recognition in America. While this private speech and viewpoint is surely protected by the First Amendment, it is understandable why the City would be extremely hesitant to finance it, especially in light of the fact that the sponsors of the event were religious organizations. Such an event, paid for, equipped by, and operated by the City, impermissibly tends to give the religious event the appearance of status in the political community.

The Supreme Court has written:

In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed . . . The line between permissible relationships and those barred by the (Establishment) Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."

Lynch, 456 U.S. 678, 104 S.Ct. at 1362 (citing Lemon, 403 US at 614).

Based upon a review of all the facts in this case, the Court concludes that the Civic Event Policy, as applied to these Plaintiffs in this case is valid and that denial of Civic Event Fund funding to the National Day of Prayer in this case was required pursuant to the Establishment Clause. The Court also concludes the Civic Event Policy satisfies the Lemon test, and is constitutional on its face, that it does not evince hostility to religion, and that it does not create impermissible entanglement with religion.

Plaintiffs fail to overcome the most serious hurdle to their claim -- the City's position that what is at stake is not access to a forum but access to funding. In spite of their claims of viewpoint-based discrimination, the Plaintiffs have framed the issue thus:

> "The question then is whether the policy excludes persons from access to free public event-related services on the basis of the content of their expression."

(Motion at 10). The answer is that the policy does deny access to funding, and that it must, out of respect for the Establishment Clause.

CONCLUSION

Having concluded that Defendants' policy of not providing Civic Event Funding in direct support of religious groups is constitutional, it follows that Plaintiffs also fail to show the risk of irreparable harm. Because the Court concludes that Plaintiffs' preclusion from consideration for Civic Event Funding funding does not amount to a violation of Plaintiffs' right to Free Speech, there is no harm demonstrated and the Court will deny the Plaintiffs' Motion for a preliminary and permanent injunction.

At the hearing on Plaintiffs' Motion for Preliminary Injunction held August 8, 1997, Plaintiffs moved to consolidate the hearing with the trial on the merits. Defendants, who had not been provided with notice of such a motion, declined to consent. Any oral argument at a trial on the merits would be essentially redundant of that made at the Preliminary Injunction hearing and the critical facts are not in dispute. The Court will therefore grant the motion to consolidate.

Accordingly,

IT IS ORDERED that:

1. Plaintiffs' Motion for Preliminary Injunction is hereby **DENIED**.

2. Plaintiffs Motion to Consolidate the hearing on Preliminary Injunction with the trial on the merits is **GRANTED.**

3. Plaintiffs' Motion for Permanent Injunction is hereby **DENIED**.

4. This action is hereby **DISMISSED**.

Dated this 29th day of September, 1997.

/s/ Frank R. Zapata
FRANK R. ZAPATA
United States District Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

PATRICIA E. GENTALA, and ROBERT A. GENTALA,	) JUDGMENT IN A CIVIL CASE
vs.	)
	) Case No. CV-97-327
CITY OF TUCSON,	) TUC-FRZ

DECISION BY COURT. This action came on for hearing before the Court. The issues have been heard and a decision having been rendered.

IT IS ORDERED AND ADJUDGED that

1. Plaintiff's Motion for Preliminary Injunction is hereby **DENIED**.

2. Plaintiff's Motion to Consolidate the hearing on Preliminary Injunction with the trial on the merits is **GRANTED**.

3. Plaintiff's Motion for Permanent Injunction is hereby **DENIED**.

4. This action is hereby **DISMISSED**.

September 30, 1997
Date

RICHARD H. WEARE
CLERK

/s/ V. Abeyta
(By) Deputy Clerk-Virginia Abeyta

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 97-17062, 97-17069

PATRICIA E. GENTALA; ROBERT A. GENTALA,
Plaintiffs-Appellants-Cross-Appellees,

v.

CITY OF TUCSON,
Defendant-Appellee-Cross-Appellant.

Argued and Submitted October 7, 1999

Filed April 20, 2000

Before: Joseph T. Sneed and Harry Pregerson, Circuit Judges; David O. Carter,[1] District Judge.

Opinion by Judge Carter; Dissent by Judge Pregerson.

CARTER, District Judge:

These appeals require us to navigate carefully the shoal-infested channel between the Scylla of the First Amendment's Free Speech Clause and the Charybdis of the First Amendment's Establishment Clause. In attempting this task, we are fully cognizant of Justice O'Connor's observation when engaged in a similar judicial endeavor: "Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging. . . . Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each

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[1]The Honorable David O. Carter, District Judge for the Central District of California, sitting by designation.

case." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 847, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995) (O'Connor, J., concurring).

FACTUAL BACKGROUND

This case arises from the City of Tucson's rejection of Patricia and Robert Gentalas' application to the City's Civic Events Fund for the coverage of costs for city services for local observances of the National Day of Prayer held in one of the City's public parks.[2]

The City established the Fund to encourage civic events and provide a budgetary mechanism for accounting for the costs of in-kind services provided by the City for certain civic events. The Fund provides support for events "that celebrate and commemorate the historical, cultural and ethnic heritage of the City and the nation, or increase the community's knowledge and understanding of critical issues, with the purpose of improving citizens' quality of life; generate broad community appeal and participation . . .; [or] instill civic pride in the City, state or nation." In-kind services provided by the City include use of the parks' event equipment, refuse containers and street sweeping.

As the organizers of the local observance of the National Day of Prayer, the Gentalas applied to the Fund for coverage of the costs of city services. The event organized by the Gentalas was part of the annual observance of the National Day of Prayer. *See Lynch v. Donnelly*, 465 U.S. 668, 677, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984). This event was established by a joint resolution of Congress in 1952. Since 1952, each

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[2]According to the Gentalas' application to the Fund, the services for which they sought coverage amounted to less than $ 500.

President has marked the Day with a presidential proclamation. For the year in question, President Clinton and the City's mayor issued a proclamation concerning the event. The Mayor's proclamation "clearly state[d] how prayer and especially the observance of a national day of prayer is part of the historical and cultural heritage of" the City and the nation. United States Air Force personnel, pastors from nine of the City's congregations, and almost one hundred people attended the event. The Gentalas' application stated that the participants would be led in prayer for various concerns: improved relationships between different segments of society; political leaders; law enforcement and emergency services personnel; youth, families, neighborhoods and the homeless; educators and schools. The application also stated that the event would include patriotic decorations and music. Thus, while the event had a strong sectarian character, as a civic event capable of increasing the community's knowledge and understanding of critical issues as well as generating broad community interest, support and civic pride, the event fell within the scope of events for which the Fund had been created.

Prior to holding their event, the Gentalas submitted an application for reimbursement of costs from the Fund to the subcommittee which administers the Fund. After the event had been mounted, the City Council reviewed the subcommittee's rejection and upheld it. Both groups cited only the Fund's explicit policy statement that "events held in direct support of religious organizations" are not eligible for the provision of services and concerns about how the Constitution regulates church-state relations in support of the rejection of the Gentalas' application.

The Gentalas subsequently filed this action alleging that on its face and as applied to their application the Fund's exception for "events held in direct support of religious organizations" violated the Free Speech, Free Exercise and Establishment Clauses of the First Amendment.[3] The Gentalas sought to enjoin the City from excluding plaintiffs and other religious groups from eligibility for coverage of costs under the Fund. The district court denied the Gentalas' motions for preliminary and permanent injunctive relief, concluding that the City's actions did not violate the Gentalas' free speech rights and that funding the National Day of Prayer activities would have violated the Establishment Clause.

During the proceedings, the City moved to amend their answer to add state-law defenses. The district court denied the City's motion to amend their answer.

Both the Gentalas and the City have filed appeals challenging the district court's respective adverse rulings.

STANDARDS OF REVIEW

We review for abuse of discretion the district court's denial of preliminary and permanent injunctive relief. *See Roe v. Anderson*, 134 F.3d 1400, 1402 & n. 1 (9th Cir. 1998), *aff'd, Saenz v. Roe*, 526 U.S. 489, 143 L. Ed. 2d 689, 119 S. Ct. 1518 (1999); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1493 (9th Cir. 1996). The district court abuses its discretion when it bases its decision on erroneous legal or

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[3]Because we conclude that the City violated the Gentalas' free-speech rights and that the Establishment Clause does not provide a sufficiently compelling reason to justify that violation in the context of this case, we do not address the Gentalas' other constitutional claims.

factual conclusions. *See Roe*, 134 F.3d at 1402 n.1; *Easyriders*, 92 F.3d at 1493.

> [T]o obtain a preliminary injunction, the moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips in its favor. These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the possibility of success decreases.

Roe, 134 F.3d at 1402. To obtain a permanent injunction, the moving party must demonstrate "the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law." *Easyriders*, 92 F.3d at 1495 (internal quotation and citation omitted). "'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148 (9th Cir.) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976)), *amended by* 160 F.3d 541 (9th Cir. 1998).

We also review for abuse of discretion the district court's denial of leave to amend. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). Although there are strong public policy justifications urging liberality in granting leave to amend, "[f]utility of amendment can, by itself, justify the denial of a motion for leave to amend." *Id.*

ANALYSIS

The Gentalas' Appeal

The Gentalas contend that the City's rejection of their application for coverage of the cost of city services under the Civic Events Fund violated their free-speech rights guaranteed by the First Amendment. In response, the City argues both that there was not a free-speech violation and that even if the Gentalas' free-speech rights were infringed, this was justified by the City's compelling interest in avoiding an Establishment Clause violation.

Free Speech/Public Forum Issue

The Supreme Court's decision in *Rosenberger* guides our resolution of the free-speech issues in this case. In *Rosenberger*, the Court reiterated that the principal evil from the government against which the Free Speech Clause protects the citizenry is discrimination on the basis of viewpoint when regulating expressive activities. *See Rosenberger*, 515 U.S. at 829 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992)); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983)). This prohibition on viewpoint discrimination retains its vitality even when government has created the forum in which expressive activities occur. *See id.*; *see also DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 969 (9th Cir. 1999).

As an initial matter, we must determine whether the National Day of Prayer event amounted to expressive conduct protected by the First Amendment's Free Speech Clause. According to the Gentalas' application, they were inviting people to gather in the park for a time of praise and worship

with singing and prayer. Such activity is speech within the meaning of the First Amendment. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995); *Widmar v. Vincent*, 454 U.S. 263, 265 n.2, 269, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981).

Having concluded that the Gentalas were engaging in speech within the meaning of the First Amendment, we must next determine the nature of the forum to which they sought access. *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985); *DiLoreto*, 196 F.3d at 964. Before determining the forum's character, however, we must clearly define the forum in question.

"The relevant forum is defined by the access sought by the speaker." *See DiLoreto*, 196 F.3d at 965 (citing *Cornelius*, 473 U.S. at 801). The parties and the district court have discussed the issues raised by this case as if both the City's parks and the City's Civic Events Fund were relevant fora. The City is correct in its assertion that the Gentalas were never denied access to the public park. They were allowed to hold their event. After having held their event, however, the Gentalas appealed the subcommittee's rejection of their application for cost-coverage of city services under the Fund to the full City Council. Given this post-event activity, we conclude that the Gentalas sought access to the Fund, not merely to the park. Although the Fund is not a forum for speech in the physical sense, as a government-created source of funding to cover costs associated with engaging in behavior deserving First Amendment protection, the Fund is a forum within the meaning of the First Amendment. *See Rosenberger*, 515 U.S. at 830 (stating that a fund created by the University of Virginia to cover the printing

costs of student organizations' publications was "a forum more in a metaphysical than in a spatial or geographical sense, but the same [First Amendment] principles are applicable").

"'Forum analysis divides government property into three categories: public fora, designated public fora, and nonpublic fora.'" *DiLoreto*, 196 F.3d at 964 (quoting *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998), *cert. denied*, 526 U.S. 1131, 119 S. Ct. 1804, 143 L. Ed. 2d 1008 (1999)); *see also Perry Educ. Ass'n*, 460 U.S. at 45-46. Because the Fund is not a source of funding for expressive activities held in trust since time immemorial, we conclude that it is not a traditional public forum. *See Perry Educ. Ass'n*, 460 U.S. at 45. Because the Fund's implementing policy states on its face that the Fund is limited to certain topics and certain speakers and because the record developed by the parties demonstrates that the Fund has been managed in a selective manner, we cannot conclude that the City has designated the Fund as a forum open to general expressive activity. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 391-92, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993); *Cornelius*, 473 U.S. at 802; *DiLoreto*, 196 F.3d at 965. Following the Supreme Court's lead in *Rosenberger*, we conclude that the Fund is a limited public forum that has been opened to support the expressive activities of certain groups speaking about certain topics. *See Rosenberger*, 515 U.S. at 829; *see also DiLoreto*, 196 F.3d at 965, 967.[4]

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[4]As the dissent correctly notes, the terms "designated public forum," "limited public forum," and "nonpublic forum" have not always been used with precision. *See DiLoreto*, 196 F.3d at 965 & n.4. A "designated public forum" is a forum which the government, through its explicit and

(continued...)

The dissent argues, relying on *National Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998), that because the City makes selective determinations when awarding reimbursements under the Fund that the Fund is exempt from forum analysis. The dissent's reliance on *Finley* is misplaced. The policy being challenged in

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[4](...continued)
intentional conduct, has designated as a forum generally open to the public for expressive activity. *See Perry Educ. Ass'n*, 460 U.S. at 46-47; *Widmar*, 454 U.S. at 267-68 & n.5, 270; *DiLoreto*, 196 F.3d at 965 & n.4. The Supreme Court has referred to a forum opened by the government to certain speakers or topics as a "limited public forum," *see Rosenberger*, 515 U.S. at 829; the Ninth Circuit has referred to such a forum as a "nonpublic forum open for a limited purpose," *see DiLoreto*, 196 F.3d at 965-66. Because content-based discrimination is not allowed absent a compelling interest in either a traditional or designated public forum, *see Perry Educ. Ass'n*, 460 U.S. at 45-46, and is permissible in fora opened for more limited purposes to preserve the nature of the forum, *see Rosenberger*, 515 U.S. at 829; *Perry Educ. Ass'n*, 460 U.S. at 46; *DiLoreto*, 196 F.3d at 965-66, the Ninth Circuit's terminology may lead to less conceptual blurriness. Regardless of the terminology used to describe the forum, however, the Supreme Court and the Ninth Circuit agree that governmental discretion in managing the more selective forum is bounded by the same considerations - reasonableness in light of the forum's purpose and viewpoint neutrality. *See Rosenberger*, 515 U.S. at 829-30; *Perry Educ. Ass'n*, 460 U.S. at 48-49; *DiLoreto*, 196 F.3d at 967, 969. Thus, because the distinction between a limited public forum and a nonpublic forum is a semantic distinction without an analytic difference, and because the *Rosenberger* Court referred to the fund it was analyzing as a limited public forum, a fund we conclude is most analogous to the Fund at issue in this case, we will continue to use that terminology. *See Finley*, 524 U.S. 569, 118 S. Ct. 2168, 2178, 141 L. Ed. 2d 500 (stating the fund at issue in *Rosenberger* was a "limited public forum"); *Rosenberger*, 515 U.S. at 829 (stating the fund being analyzed by the Court was a "limited public forum"); *DiLoreto*, 196 F.3d at 965 (noting that the *Rosenberger* Court had used the term "limited public forum").

Finley was of a different character than the policy being challenged in this case. As the Supreme Court was careful to point out, the "decency" criterion in *Finley* was one of several criteria for the NEA to consider when making funding decisions, *see* 118 S. Ct. at 2175-76, whereas the City's Fund renders any "event held in direct support of religious organizations" absolutely ineligible for reimbursement of costs. Moreover, the nature of the challenges to the respective policies in *Finley* and this case are of a notably different character. In *Finley*, the Supreme Court was considering a facial challenge to the NEA's "decency" criterion. *See id.* at 2175, 2178. This is relevant for at least two reasons. First, the burden on litigants pursuing a facial challenge is much heavier than the burden on litigants pursuing an as-applied challenge. *See id.* at 2175. Second, even a policy which is viewpoint-neutral on its face may be applied in a viewpoint-discriminatory manner. The Court in *Finley* explicitly pointed out that they were not considering "a situation where the denial of a grant may be shown to be the product of invidious viewpoint discrimination" because the litigants had brought a facial challenge. *See id.* at 2178. In this case, however, we are considering an actual denial by the City and we know the motivation behind the City's decision. Even if we agreed with the dissent's analysis that the City could have denied the Gentalas' application for a number of reasons under the Fund's implementing policy, in actuality, the record shows - and the City has never contested - that the application was denied due to the religious character of the event for which the Gentalas were seeking reimbursement. These factors - the absolute bar for reimbursement of certain kinds of events in the City's policy, the character of the Gentalas' challenge, and the state of the record - make this appeal more like *Rosenberger* than like *Finley*.

In maintaining the boundaries and integrity of the Fund, the City will, of necessity, engage in discrimination on the basis of the content of applicants' speech. In managing this forum, however, the City's decisions to exclude speakers must be reasonable in light of the Fund's purposes. *See Rosenberger*, 515 U.S. at 829; *DiLoreto*, 196 F.3d at 965, 967. Thus, content-based discrimination is legitimate only if conducted consistent with the Fund's purposes, whereas any discrimination between applicants on the basis of viewpoint is forbidden. *See Board of Regents of the Univ. of Wis. Sys. v. Southworth*, 120 S. Ct. 1346, 146 L. Ed. 2d 193, 2000 WL 293217, at *10 (U.S. 2000); *Rosenberger*, 515 U.S. at 829-30; *DiLoreto*, 196 F.3d at 965, 967.[5]

The Fund's implementing policy states that the Fund has been created, in part, to "encourage and support [c]ivic [e]vents that: celebrate and commemorate historical, cultural and ethnic

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[5]Although the Supreme Court's decision in *Widmar* is instructive in our analysis of the issues on appeal, the distinction between discrimination permissible in traditional and designated public fora on the one hand and in limited and nonpublic fora on the other prevents *Widmar* from controlling the present case. The Supreme Court classified the meeting space in *Widmar* as a designated public forum. *See Widmar*, 454 U.S. at 267-68 & n.5, 270. The Court then concluded that prohibiting groups from using classrooms as meeting space "based on the religious content of the group's intended speech" was content-based discrimination that could only be justified by a compelling interest and a narrowly tailored regulation. *Id.* at 270. If the Fund were a traditional or designated public forum, the exception for religious speech would be an impermissible content-based discrimination. *See id.* at 276. Because the Fund is, at most, a limited public forum opened for certain speakers and topics, *Widmar* is inapplicable to the free-speech analysis and we must determine whether the exception discriminates on the basis of viewpoint on its face or as applied to the Gentalas by the City.

heritage of the City and the nation, or increase the community's knowledge and understanding of critical issues, with the purpose of improving citizens' quality of life; generate broad community appeal and participation; [or] instill civic pride in the City, state, or nation." While the Gentalas' event obviously had sectarian elements, as previously described, it also had a civic character and fits comfortably within the general subject matter of events for which the Fund was created.[6]

The policy explicitly excludes those "events held in direct support of religious organizations" and the City relied upon this exemption when rejecting the Gentalas' application. The Gentalas' application indicates that a free-will offering was to be taken at the end of the event. Although such an offering would probably be small in relation to the cost of mounting the event,[7] the offering might provide some degree of financial support for the organizers of the event. The requested reimbursement from the City's Fund, some $340 in costs, is also a meager financial outlay. The record establishes that the National Day of Prayer was publicized and organized in a

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[6]For this reason, the dissent's reliance on *DiLoreto* is misplaced. In *DiLoreto*, this Court upheld the School District's refusal to post the text of the Ten Commandments on Downey High School's baseball field fence. *See DiLoreto*, 196 F.3d at 962. The Court concluded that the refusal was permissible content-based discrimination, not because of the religious character of the posting *per se*, but because the forum itself had been limited to business advertising. *See id.* at 969. ("Mr. DiLoreto's ad was not a statement addressing otherwise-permissible subjects from a religious perspective . . . .") Because the Gentalas' event fit the religiously neutral criteria for inclusion within the forum created by the City's Fund, this case is distinguishable from *DiLoreto*.

[7]The prior year, the free-will offering raised $ 393.84 and the expenses associated with the event amounted to $ 404.54.

manner consistent with the Judeo-Christian tradition and counsel for the Gentalas stated at oral argument that the National Day of Prayer event was presented from a Christian perspective. Thus, the event had a clear religious perspective and we must acknowledge that a public prayer service conducted from such a perspective would support members of Jewish and Christian religious organizations more than members of other faith traditions or members of the public-at-large who belong to a non-religious tradition. We cannot conclude, however, that the minimal and diffuse benefits from this event amount to a constitutionally impermissible support of religion.

Although we have concluded that reimbursement of the event's costs under the Fund was not direct support of religion in a constitutional sense, we cannot conclude that the City acted in bad faith when deciding that the National Day of Prayer event fell within the Fund's exception. *See Cornelius*, 473 U.S. at 808 ("The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation."). Even if the exclusion was reasonable, however, the City could not reject the Gentalas' application based on their viewpoint as speakers. *See Rosenberger*, 515 U.S. at 830; *DiLoreto*, 196 F.3d at 969. In other words, the Gentalas' application could not be denied merely because it would bring a religious perspective to an otherwise permissible conversation. *See Rosenberger*, 515 U.S. at 831; *Lamb's Chapel*, 508 U.S. at 393-94.

As noted previously, the Supreme Court in *Rosenberger* examined a fund established by the University of Virginia to cover the printing costs for publications from approved student groups. *See Rosenberger*, 515 U.S. at 824. The University

excluded from its scheme those publications written by groups engaging in "religious activities." *Id.* at 825. Wide Awake Productions, a student group which published a magazine "offer[ing] a Christian perspective on both personal and community issues," was denied coverage under the policy. *Id.* at 825-27. The Supreme Court concluded that the University's denial of coverage was an unconstitutional form of viewpoint discrimination. *See id.* at 831; *see also Southworth*, 120 S. Ct. 1346, 146 L. Ed. 2d 193, 2000 WL 293217, at *10. In reaching this conclusion, the Supreme Court relied heavily on *Lamb's Chapel*. *See Rosenberger*, 515 U.S. at 830-32. In *Lamb's Chapel*, a local school board permitted community groups to use its buildings after hours, but denied access to a group wanting to show a film series "that . . . would discuss . . . the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values." *Lamb's Chapel*, 508 U.S. at 386-88.

The National Day of Prayer event was, in part, a civic gathering drawing the community together to address issues of community-wide concern - e.g., homelessness, education, law enforcement. The nature of the event fits within the general purposes of the forum. Moreover, there is no indication from the record that if a local public school wanted to hold a fund-raiser or if a group of social service providers wanted to hold a rally on behalf of homeless people that the City would have denied their applications to the Fund.[8] The Gentalas'

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[8]Although both the *Rosenberger* and *Lamb's Chapel* Courts concluded that the government had engaged in viewpoint discrimination, in neither opinion was there any discussion of other speakers being allowed access to the forum to discuss the same issues from a non-religious perspective. In

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application was rejected because of their view that the most relevant manner in which to address these important social concerns was through the expressive acts of worship, singing and prayer. "Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective . . . resulted in the refusal" to provide access to the relevant forum. *Rosenberger*, 515 U.S. at 831.

The record also indicates that the City had approved an application to the Fund by the Tucson Festival Society and Carrillo School for a Las Posadas festival. The festival is a re-enactment of a story from Christian folklore - namely, Joseph and Mary's search for lodging in Bethlehem prior to the birth of Jesus. The City approved funding for this "religious-related" event because it was "art" and was "not held to directly support a religious organization." Because the Las Posadas festival re-enacts an event connected with the Christian tradition, it would provide the same kind of diffuse support for Christianity writ large as would the National Day of Prayer event. Thus, the City decided that artistic expression was a sufficiently indirect way of engaging a religious tradition - and therefore an appropriate activity in the forum, but that public prayer was too direct a

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[8](...continued)
Lamb's Chapel, the Court was satisfied that the school board had engaged in viewpoint discrimination where the record was silent on the question of whether the subject matter seeking to be addressed by the religious speaker was forbidden, but the record clearly established that the film series was rejected because of its religious perspective. *See Lamb's Chapel*, 508 U.S. at 393-94.

way of engaging a religious tradition - and therefore an inappropriate activity in the forum.

Although we can sympathize with the difficult judgment calls the City is required to make when reviewing applications to the Fund, we conclude that its rejection of the Gentalas' application was impermissible viewpoint discrimination in violation of the Free Speech Clause of the First Amendment. *See Rosenberger*, 515 U.S. at 829-831; *Lamb's Chapel*, 508 U.S. at 392-94. Moreover, in light of our discussion of the Las Posadas application, we conclude that distinguishing between those who speak about religion who are directly supporting a religious organization and those who speak about religion who are not will always require the City to discriminate on the basis of the speakers' viewpoint. *See Board of Educ. of the Westside Community Schs. v. Mergens*, 496 U.S. 226, 248, 253, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990); *Widmar*, 454 U.S. at 272 n.11.

Establishment Clause Issue

The City contends that its rejection of the Gentalas' application was justified in light of the City's compelling interest in obeying the strictures of the First Amendment's Establishment Clause.[9] Following the Supreme Court's lead in *Rosenberger,* we reject the City's argument and conclude that reimbursing costs for the Gentalas' event under the Fund would not have violated the Establishment Clause. *See Rosenberger*, 515 U.S. at 839.

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[9]Obeying the mandate of the Establishment Clause is undeniably a compelling state interest. *See Capitol Square*, 515 U.S. at 761-62; *Lamb's Chapel*, 508 U.S. at 394.

A majority of the Justices of the Supreme Court have never agreed as to the precise meaning and relevance of the history of the Establishment Clause. The Court has agreed, however, that the Establishment Clause

> means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Everson v. Board of Educ. of Ewing TP, 330 U.S. 1, 15-16, 91 L. Ed. 711, 67 S. Ct. 504 (1947). At the same time, the Supreme Court has repeatedly stated that government may acknowledge the role of religion in the life of its citizenry and incorporate some religious expression into public life. *See Lynch*, 465 U.S. at 674-78; *Marsh v. Chambers*, 463 U.S. 783, 792, 77 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983). The "central lesson" of the Supreme Court's Establishment Clause jurisprudence "is that . . . governmental programs" must maintain "neutrality towards religion." *Rosenberger*, 515 U.S. at 839. On a number of occasions, the Court has concluded that governmental programs which distribute benefits on religiously

neutral grounds do not run afoul of the Establishment Clause merely because they provide incidental benefits to organizations that seek to engage in religious expression. *See id.*; *Capitol Square*, 515 U.S. at 762-63; *Widmar*, 454 U.S. at 273-74.

When determining whether the relationship between religious expression and the government is permissible under or violative of the Establishment Clause, "it [is] useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion." *Lynch*, 465 U.S. at 679 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971)). At the same time, we are not bound "to any single test or criterion in this sensitive area." *Id.*

The City's Fund, which exists to support and encourage events celebrating the history and culture of the City's residents, undeniably serves a secular interest. *See Lamb's Chapel*, 508 U.S. at 395; *Widmar*, 454 U.S. at 271. Insofar as the City seeks to avoid entanglement with religion when administering the Fund, its best opportunity for doing so is to abandon attempts to distinguish between religious expression that directly supports a religious organization and religious expression that indirectly supports religion. *See Widmar*, 454 U.S. at 272 n.11.

The City's Fund also does not have the primary or principal effect of advancing religion. The Supreme Court has concluded that a state university's provision of a classroom to a student Bible study club for its meetings constituted only negligible aid for such devotional exercise and thus was not constitutionally impermissible. *See Widmar*, 454 U.S. at 273. In *Lynch*, Chief Justice Burger, writing for the majority, concluded that a

nativity scene, while religiously significant by itself, when placed by the city government among secular symbols such as "candy-striped poles . . ., carolers, [and] cutout figures representing such characters as a clown, an elephant, and a teddy bear" in the business district of the City of Pawtucket, Rhode Island, did not substantially support any religion in a constitutionally problematic manner. *Lynch*, 465 U.S. at 671, 687.

> The dissent asserts some observers may perceive that the City has aligned itself with the Christian faith by including a Christian symbol in its display and that this serves to advance religion. We can assume, arguendo, that the display advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. The Court has made it abundantly clear, however, that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771, 37 L. Ed. 2d 948, 93 S. Ct. 2955 (1973).

465 U.S. at 683. Similarly, here, even if the City's reimbursement of costs for the National Day of Prayer event provided some support for theism over its opposite, or for Christianity over competing world views, the support provided by the City was neither substantial nor direct enough to amount to advancement of religion under the Supreme Court's Establishment Clause jurisprudence.

In more recent cases involving private religious speech in government-created fora, the Supreme Court has focused on whether the religious expression occurring in the forum has

been endorsed or favored by the government when determining whether there is an Establishment Clause violation. *See Capitol Square*, 515 U.S. at 762-65; *Rosenberger*, 515 U.S. at 839-40; *Lamb's Chapel*, 508 U.S. at 393. In *Rosenberger*, the most legally and factually analogous case to the one before us, the Court reviewed the constitutionality of the University of Virginia's refusal to cover the printing costs of a student publication, based on the publication's religious perspective, due to the University's concern that covering the costs would violate the Establishment Clause. *See Rosenberger*, 515 U.S. at 822-23. The Court concluded that the University would not violate the Establishment Clause by covering the publication's printing costs when using "neutral criteria and evenhanded policies" to determine which applicants would have their costs covered. *See id.* at 839, 845-46.

The first distinction between *Rosenberger* and the present case urged by the City is that the publication in *Rosenberger* was not produced by a "religious organization," *see id.* at 826 & 844, and that the event for which the Gentalas sought in-kind services was. Assuming that the City is correct that the organization responsible for managing the National Day of Prayer is a religious organization, we conclude that this factual difference is an insufficient basis for distinguishing *Rosenberger*. In *Widmar*, the Supreme Court reviewed the University of Missouri at Kansas City's decision to forbid "an organization of evangelical Christian students from various denominational backgrounds" from meeting in "facilities generally available for activities of registered student groups." *Widmar*, 454 U.S. at 264-65 & n.2 (1981). The Supreme Court dismissed the University's concerns about an Establishment Clause violation for its provision of meeting space for the student group acknowledging that it was "possible - perhaps

even foreseeable - that religious groups will benefit from access to University facilities." *Id.* at 273. *Widmar* demonstrates that the mere provision of services or conferral of benefits to a religious organization under an otherwise neutral policy does not, without more, violate the Establishment Clause. *See Rosenberger*, 515 U.S. at 839; *Widmar*, 454 U.S. at 273-74. Moreover, the *Rosenberger* Court itself stated that even if the organization seeking coverage of printing costs from the University of Virginia was a "church," there would be no Establishment Clause violation because the scheme at issue was not making "*direct* money payments to an institution or group that is engaged in religious activity." *Rosenberger*, 515 U.S. at 842 (emphasis added).

In a similar vein, the dissent relies on the Gentalas' original applieation for reimbursement from the Fund, and attachments thereto, which state that the National Day of Prayer event was being organized for "Tucson Christians." The district court stated that the National Day of Prayer event was open to the public and nothing in the record or the comments by the City Council which reviewed the Gentalas' application after the event had been held indicates that the event excluded non-Christians from the event. The fact that a government-subsidized event which remains open to the public is organized for and by a particular religious group is insufficient to create an Establishment Clause violation. *See Widmar*, 454 U.S. at 265 n.2 (noting that a Christian group's meetings were "open to the public"). Finally, the dissent notes that all the speakers at the event were Christians to support the charge of an Establishment Clause violation. In *Rosenberger*, however, the publication which the University of Virginia refused to subsidize - a decision the Supreme Court rebuked - was a

magazine with an explicit and obvious Christian perspective on the issues discussed. *See Rosenberger*, 515 U.S. at 825-26.

In *Widmar* and *Rosenberger*, the Supreme Court was much less concerned about the religious identity or message of the speakers being subsidized by the state than it was about the nature of subsidy being offered. The Court's concern in these cases is whether the support offered by the state is part of a neutral program available to a large range of speakers or whether it is a program designed and administered to further religious interests in some direct way. The City and the dissent would have us read the Establishment Clause in a way that forbids religious groups and religious speakers from participating in and taking advantage of neutral government programs available to citizens motivated by non-sectarian concerns. Such a theory of the Establishment Clause implicitly denigrates those citizens who seek to operate in the public realm and engage the larger culture in light of their religious convictions and fails to take seriously the constitutional values enshrined in the Free Speech and Free Exercise Clauses.

The *Rosenberger* Court focused extensively on whether the payments from the University of Virginia's fund were being made directly to the student organization. *See id.* at 842-43. We agree with the City and the district court that the *Rosenberger* Court was careful to explain that its conclusion might have been different if the scheme under review had involved "a tax levied for the direct support of a church," *id.* at 840, if the money available could be used for "unlimited purposes," *id.* at 841, or if the program made "direct money payments to . . . a group that is engaged in religious activity," *id.* at 842. The City's own evidence, however, demonstrates that the Fund is not the kind of policy about which the *Rosenberger* Court

expressed suspicion. According to a management analyst from the City's Department of Budget and Research, money from the Fund is never paid directly to the event sponsors - event sponsors request services from the City; the relevant City departments submit billing statements to the Fund instead of the event sponsors; the costs of the services are charged against the Fund. As its implementing policy states, the Fund is "a budgetary means of detailing the costs City departments incur providing in-kind support to Civic Events." Moreover, the City maintains control over what services will be covered by the Fund and the amount the Fund will be charged for these services. Although the City's absorption of costs for in-kind services through the Fund clearly provides a benefit to the National Day of Prayer event, this is not a case where the City "is making direct money payments to an institution or group that is engaged in religious activity." *Id.* at 842-43. Moreover, insofar as the in-kind services made available under the Fund were the provision of physical-plant facilities, the Supreme Court has concluded that such services are "'incidental' benefits" which can be provided to religious groups by the government without violating the Establishment Clause. *See Widmar*, 454 U.S. at 273.

The City also argues that this case is different from *Rosenberger* because the Fund is created through general revenue taxes and the printing-cost fund in *Rosenberger* was created through the assessment of student fees. The Supreme Court did state in *Rosenberger* that its decision "cannot be read as addressing an expenditure from a general tax fund." *Rosenberger*, 515 U.S. at 841. While this is a close question, we conclude that the City presses this difference as a formal distinction whereas the Court used it as a functional one. Both student-fee and general-tax assessments are mandatory on the

relevant population. *See id.* at 840 (treating the student-fee as a mandatory assessment). Thus, it cannot be the mandatory character of a general tax that would give rise to different considerations under the Establishment Clause. A plurality of the Court distinguished between a student fee and a general tax based on the limited purposes for which the student fees could be used and the neutrality of the program under which the student fees were distributed. *See id.* at 840-41. Given that the Fund was used for a limited purpose, that the City maintains a great deal of discretionary control over the Fund, and that the Fund is not administered to favor religion, we conclude that the Fund is more like the student-fee generated fund in *Rosenberger* than a general-tax generated fund.[10] The Supreme Court's concern about direct payments to religious organizations and their treatment of the student-fee/general-tax

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[10]In her concurrence, Justice O'Connor identifies two other reasons why a fund created by student fees should be analyzed differently than a fund created by general tax assessments. *See id.* at 851-52. Justice O'Connor observes that the fund in *Rosenberger* "belongs to the students" because it is administered by them and is used to benefit those who paid into the fund. *See id.* Given that the Fund is administered by a City Council composed of duly-elected representatives of the residents of the City of Tucson to provide civic events for the benefit of the residents of the City of Tucson, we conclude that it belongs to the City in a similar fashion. Justice O'Connor also observes that students may have a First Amendment right to "opt-out" of student-fee assessments not available to citizens who have to pay tax assessments. *See id.* at 851. This is a distinction between the Fund in *Rosenberger* and the City's Fund, but it is a distinguishing characteristic which only garnered one vote from the Court. Moreover, a majority of the Court has subsequently rejected such an argument with respect to viewpoint-neutral subsidy programs. *See Southworth*, 120 S. Ct. 1346, 146 L. Ed. 2d 193, 2000 WL 293217, at *2. Accordingly, we cannot find it a persuasive rationale for why this case should be resolved differently than the majority resolved *Rosenberger*.

distinction provides a larger perspective on the underlying rationale of *Rosenberger*. The Court has acknowledged in *Widmar, Mergens,* and *Lamb's Chapel* that programs of the state which provide benefits to groups on a neutral basis may benefit religious groups or religious perspectives when the relevant group meets the criteria of the program. In *Rosenberger,* the Court once again articulated its view that the Establishment Clause is not violated when religious groups happen to benefit from programs which are, by all accounts, neutral as to religion. *See Rosenberger*, 515 U.S. at 839. Only where the programs would provide in-kind or financial benefits which would allow the religious organization to pursue its sectarian goals in an unfettered way on the government's dole or in the government's forum is the Establishment Clause possibly violated. Where, as in *Rosenberger* and as with the Fund, the government does not make direct payments to the organization and maintains control over which activities will be subsidized, the government can ensure that only those activities by sectarian groups which have a sufficient secular import will receive government assistance. Allowing religious groups to participate as beneficiaries of otherwise neutral programs fosters the nation's commitment to freedom of expression and to religious liberty without raising the specter of a state-sanctioned or state-funded church, which was the historical inspiration of the Establishment Clause. *See Lynch*, 465 U.S. at 678.

Finally, the *Rosenberger* Court noted that "[t]he University has taken pains to disassociate itself from the private speech involved in this case." *Rosenberger*, 515 U.S. at 841. Whether private religious speech would be mistaken for the speech of the government is a central inquiry under the Establishment Clause. *See id.*; *Widmar*, 454 U.S. at 274. The City and the

district court relied on the presence of City employees operating lighting and sound equipment to establish that the National Day of Prayer event could be mistakenly interpreted as the speech of the City. In light of *Widmar*'s teaching that allowing religious groups to meet on campus is insufficient to "confer any imprimatur of state approval," we conclude that the presence of City employees, without more, does not create such an imprimatur. *See Widmar*, 454 U.S. at 274 & n. 14; *see also Mergens*, 496 U.S. at 249-50, 253.[11]

The record also demonstrates, however, that any event having costs covered by the Fund must "acknowledge through event advertising and an announcement during [the] event that the City has contributed services to the event." In *Capitol Square*, 515 U.S. at 763, a plurality of the Court rejected the government's argument that a cross erected by a private group and placed in close "proximity to the seat of government" would violate the Establishment Clause because it "may produce the perception that the cross bears the [government's] approval." The plurality stated that government endorses

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[11]It is important, when considering how the situation of the National Day of Prayer event having costs covered by the City's Fund would be interpreted by observers, to note that most of the attendees of the event were probably adults. *See Marsh*, 463 U.S. at 792 (stating that an adult is "not readily susceptible to 'religious indoctrination,' or peer pressure") (citations omitted); *see also Widmar*, 454 U.S. at 274 n.14, 70 L. Ed. 2d 440, 102 S. Ct. 269 (stating that "[u]niversity students . . . are less impressionable than younger students" and should be able to appreciate the government's neutrality toward religion even when a religious group is benefitting under a university program); *Mergens*, 496 U.S. at 250-51 (stating that high school students are also able to distinguish between a government endorsement of religion and a neutral governmental policy that happens to aid religion).

religious expression in violation of the Establishment Clause only when the government speaks for itself or manages a forum in favor of private religious expression. *See id.* at 764. The plurality observed that "it is no violation [of the Establishment Clause] for government to enact neutral policies that happen to benefit religion." *Id.* While the concurring Justices gave a greater role to the conclusions of a reasonable observer in determining whether the government had endorsed the expression of a private speaker than the plurality, *see id.* at 777 (O'Connor, J., concurring) and 784-86 (Souter, J., concurring), they also rejected the government's Establishment Clause argument observing that the city could require that a sign be placed on or near the cross explaining that the city did not endorse the expression of the private speaker, *id.* at 776 (O'Connor, J., concurring) and 784 (Souter, J., concurring). The National Day of Prayer event was not the expression of the City itself and there is no allegation that the Fund was managed in a way that discriminated in favor of religious speech. The City maintained control over the content of the statement in the event's advertisement and could have modified it to decry any endorsement by the City of the event's content. Thus, we agree with the district court that the advertisement requirement is insufficient to demonstrate that the City endorsed the expression of the Gentalas. *See id.* at 764.

Because we have concluded that the City engaged in viewpoint discrimination in violation of the First Amendment when rejecting the Gentalas' application to the Fund and that the exception for events which directly support religious organizations is unconstitutional on its face, and that the Establishment Clause does not provide a compelling interest justifying that discrimination, it is now apparent that the district court based its determination that the Gentalas were unlikely to

succeed on the merits of this case on an erroneous legal conclusion. *See Roe*, 134 F.3d at 1402; *Easyriders*, 92 F.3d at 1493. Moreover, because the Gentalas' expressive freedoms were violated as a result of the City's unconstitutional activities, the Gentalas suffered an irreparable injury. *See S.O.C.*, 152 F.3d at 1148.

Accordingly, we reverse the district court's denial of the Gentalas' motions for preliminary and permanent injunctions and we remand for further proceedings.

The City's Cross-appeal

The City has also filed a cross-appeal contending that the district court abused its discretion by denying its motion for leave to amend its answer to assert a defense under the Arizona constitution. In *Widmar*, the Supreme Court concluded that Missouri's state constitutional defenses were insufficiently compelling to override free-speech interests protected by the Federal Constitution. *See Widmar*, 454 U.S. at 276. Because we have concluded that the City's denial of the Gentalas' application would have violated the Free Speech Clause, we conclude that the City's proposed amendment would have been futile and that the district court did not abuse its discretion by denying it leave to amend its answer. *See id.*; *Bonin*, 59 F.3d at 845.

Accordingly, we affirm the district court's denial of the City's motion for leave to amend its answer.

CONCLUSION

While the idea of the government subsidizing a public prayer service raises obvious Establishment Clause concerns, the idea of excluding religious speakers from neutral

government programs because of their identity and their message raises equally compelling Free Speech and Free Exercise questions. These principal guarantees of the First Amendment require the government to juggle conflicting obligations toward its citizens. On the one hand, the Establishment Clause obligates government to inspect vigilantly its practices and policies to ensure that they do not create the impression that government is endorsing or favoring religion or any form of religious expression. On the other hand, the Free Speech and Free Exercise Clauses require the government to monitor carefully its policies and practices to ensure that they do not unnecessarily trammel on individuals' opportunities to engage in expressive conduct, especially expressive conduct which stems from religious faith and belief. As much as we would like to provide local, state and national governmental entities with bright lines and simple tests to simplify the task of making decisions in this complex and politically charged area, drawing exact lines and articulating formulaic tests is belied by the purposes of the First Amendment guarantees themselves. *See Lynch*, 465 U.S. at 678-79.

We do, however, offer some general guidance to the City of Tucson and other governmental decision-makers based on our examination of this appeal and our investigation of the relevant Supreme Court decisions in this area. Where the government has created a forum for expressive activities, and a private speaker meets the criteria for access to the forum, the speaker cannot be excluded merely because the speaker's expression addresses religion or adopts a religious perspective on an otherwise permissible topic. In addition, where the governmental forum includes the provision of financial subsidies or in-kind services, as long as those services are

provided to all speakers in the forum on a religiously neutral basis, provision of such subsidies or services to a speaker with a religious perspective will not violate the Establishment Clause.

Our resolution of the issues in a manner different from the City of Tucson and the district court should not be construed as to cast any doubt that the City and the court took their obligations seriously and carefully considered their conclusions. After reviewing the particular facts of this appeal, we have merely drawn the lines between the guarantees of the Free Speech and Establishment Clauses in a different fashion than did the City and the district court.

The City shall bear the costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.

DISSENT:

PREGERSON, Circuit Judge, dissenting:

I dissent. The district judge got it right. Taxpayer funds may not be used to support a religious organization. And that is undisputedly what Appellants' organization is - a religious organization. *See* Appendix at 3, 5.

As the majority opinion notes, resolution of cases like this one "depend[ ] on the hard task of judging." *See supra* at 1059 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 847, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995) (O'Connor, J., concurring)). Indeed, "[s]uch judgment requires the court to draw lines, sometimes quite fine, *based on the particular facts of each case*." *Id.* (emphasis added). The facts of this case are crucial and should not be diluted.

Appellants' organization, the Tucson National Day of Prayer Committee, applied for financial support from a fund largely consisting of taxpayer money for an event whose stated purpose was to "organize an annual gathering of Tucson Christians." *See* Appendix at 3, 5. Appellants did not organize a National Day of Prayer for all Tucson residents of all faiths; their event was for Tucson Christians only. *See id.* Moreover, Appellants' application for funding clearly stated that an individual's membership in their organization, the Tucson National Day of Prayer Committee, would be *terminated* if the individual would not "pledge" to the Christian belief. *Id.* In fact, at no time during oral argument or in their briefs on appeal have Appellants denied that their organization is a "religious organization."

The constitutionality of the congressionally established National Day of Prayer is *not* at issue here. Appellants' event, for "Tucson Christians," should not be confused with the national event that was created by congressional resolution in 1952. The language of the congressional resolution indicates that Congress, in declaring a "National Day of Prayer," intended the day to be a day for all Americans, of all faiths. As one representative noted, "no single religious group can claim ownership or control of the National Day of Prayer; rather, it truly belongs to all Americans who seek divine guidance for themselves and for the country." 134 Cong. Rec. H2761-02 (May 12, 1988) (statement of Rep. Dymally).

Thus, this case is not about the constitutionality of the National Day of Prayer. The only issue presented in this case is whether the City of Tucson violated the Constitution by denying Appellants taxpayer funds to subsidize the cost of their event. Because I believe the City acted clearly within the

bounds of the Constitution, I would affirm the well-reasoned decision of the district court.

I.

Appellants are active sponsors and organizers of the Tucson National Day of Prayer. Appellants requested permits and funding from the City of Tucson ("the City") to hold the event in the City's Demeester Outdoor Performance Center ("Demeester bandshell"). Appellants obtained the necessary permits and the event was held as planned, but the City denied Appellants' request for funding. As a result, Appellants' organization had to pay approximately $ 340 to rent equipment used for production of the event.

The City allows members of the public to use its parks for a wide variety of purposes. The Demeester bandshell is located in Tucson's Reid Park. Pursuant to Tucson Code sections 21-14 and 21-16, specific fees are charged for the use of event equipment, park bandshells, and other facilities owned by the City. Grants are available from the City's Civic Events Fund, on a limited basis, to help subsidize the cost of *civic* events. The Civic Events Fund consists of City money from the general fund appropriated by the City's Mayor and Council each year. The source of the funds includes *tax revenue*, user fees, and other sources of recurring and non-recurring revenue. Sponsors of events at Reid Park may request a grant from the Civic Events Fund through the City's Civic Events Subcommittee ("Subcommittee").

For the 1997 Tucson National Day of Prayer, the Appellants obtained permits to hold the prayer event in the Demeester bandshell. The event was carried on as planned, and Appellants do not allege that the City's actions impeded free

speech at the event in any way. Rather, Appellants allege that the City discriminated against the organization by refusing to support the Tucson National Day of Prayer financially with funds from the Civic Events Fund. They are mistaken.

The Civic Events Fund exists to encourage and support civic events that celebrate the City's heritage, increase knowledge and understanding of issues that improve citizens' quality of life, generate community appeal and participation, contribute to tourism, or are otherwise identified as unique community events. A number of conditions must be met for an event to be eligible for City support. These conditions, which are listed in the City's "Civic Event Policy Statement and Evaluation Criteria" ("Policy") include: (1) the event must be sponsored by a non-profit organization or by individuals conducting the event on a non-profit basis; (2) the event must be open to the public and cannot discriminate against persons in any manner; and (3) the event sponsor must maintain liability insurance, maintain a financial accounting of the event, and acquire necessary permits from the City. The Policy further indicates that "events held in direct support of religious organizations" are not eligible for funding from the Civic Events Fund.

The City does not automatically award grants to all eligible events pursuant to the City's Civic Event Policy. Once the Subcommittee determines that an event is "eligible" for funding, the Subcommittee, using "Evaluation Criteria," assesses the event to determine whether it is one that the City will co-sponsor. To determine whether an event should receive funding, the City considers a number of factors including: (1) the purpose and objectives of the event; (2) the extent to which the event generates broad community appeal and participation;

(3) the event's need for support; and (4) the event's ability to obtain financial support from other public and private sources. In the past the City has refused to fund a number of non-religious events as well as events that the Subcommittee determined were "in direct support of religious organizations." On the other hand, the City has funded events sponsored by religious organizations that did not directly support religious organizations. For example, the City provided funding for a fishing clinic for disabled children that was co-sponsored by the Aid Association for Lutherans.

In this case, Appellants' event was designed to directly benefit their religious organization. Although Appellants argued that members of all faiths could have participated in the event, according to Appellants' own *application*,[1] only those who "pledge" to the Christian belief could participate as members of

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[1]The majority claims that "the dissent relies on the Gentalas' original application for reimbursement from the Fund, and attachments thereto, which state that the National Day of Prayer event was organized for 'Tucson Christians.'" *See supra* at 1068. Indeed, the application for funding clearly indicated that the purpose of the event was "To organize an annual gathering of Tucson Christians to observe the National Day of Prayer," *see* Appendix at 5. This is what the Subcommittee had before it when it decided to reject the Gentalas' application for funding.

Moreover, question 10 on the application asks, "Does your organization require its members to pledge to any specific religious belief?" To which the Gentalas marked "Yes" and wrote in "Christian." Appendix at 5. The second part of question 10 asks, "If yes, would a person's membership be terminated if the person would not make such a pledge?" Again, the Gentalas marked "Yes." Appendix at 5. I am not aware of any case where any court found that a similar organization (that required its members to pledge to a specific religious faith and would terminate a person's membership if they did not) was *not* a "religious organization."

their organization.[2] *See* Appendix at 5. Indeed, the Appellants' application for funding declared that the purpose of the event was to "organize an annual gathering of Tucson Christians to observe the National Day of Prayer." *Id.* at 3, 5. After reviewing the application, the Subcommittee refused to fund the event because it would directly support a religious organization.[3]

The majority finds that the City's refusal to fund the Tucson National Day of Prayer violated the First Amendment. I disagree for several reasons. First, the Civic Events Fund is not a limited public forum as the majority asserts. In fact, the majority's analysis of this case using "forum doctrine" is not appropriate given the nature of the Civic Events Fund. Second, the majority opinion disregards Supreme Court precedent which establishes that there is an important distinction between a government's refusal to fund protected activity and a government's actual denial of a person's constitutional rights. *See e.g., National Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S. Ct. 2168, 2179, 141 L. Ed. 2d 500 (9th Cir. 1998); *Rust v. Sullivan*, 500 U.S. 173, 193, 111 S. Ct. 1759, 114 L. Ed.

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[2]The majority incorrectly asserts that the Gentalas' event was a "public prayer service conducted from such a perspective [that] would support members of Jewish and Christian religious organizations . . . ." The prayer service, as Appellants' counsel admitted at oral argument, addressed a Christian perspective only. And the only individuals that spoke at the prayer service were Christians - they were not members of the Jewish faith as the majority opinion suggests.

[3]Although the Subcommittee did not evaluate whether the event would otherwise meet the criteria for funding, it appears that the event would not because: (1) the Tucson National Day of Prayer Committee was not a non-profit organization; (2) money was collected at the event; and (3) it is highly doubtful that the event "did not discriminate against any persons in any manner" as required by the Policy.

2d 233 (1991). Third, the City has a compelling state interest for excluding events that are "in direct support of religious organizations" from funding eligibility - compliance with the Establishment Clause. Accordingly, I would conclude that the City did not violate the Constitution when it refused to co-sponsor an event, that intended to "organize an annual gathering of Tucson Christians," using taxpayer funds.

II

This is not a case involving the denial of "equal access" to City facilities; rather, it simply involves the denial of taxpayer funding. If the City had denied Appellants access to the Demeester bandshell, which is a traditional public forum, this would be a different case. But Appellants were not denied access to the bandshell. Thus, their Free Speech claim can succeed only if they can demonstrate that the Civic Events Fund is a type of forum protected by the First Amendment.

The majority contends that the Fund is a limited public forum[4] and that the City's refusal to fund events that directly support religious organizations constitutes viewpoint discrimination. I disagree. The majority's analysis of this case using forum doctrine is not appropriate because the Civic Events Fund is not a forum at all. In addition, the Supreme

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[4]As noted in *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 n.4 (9th Cir. 1999), "[t]he contours of the terms 'designated public forum' and 'limited public forum' have not always been clear." (citations omitted). Here, the majority concludes that the Civic Events Fund is a "limited public forum." *Supra* at 1062. It is perhaps more precise to state that the majority finds that the Civic Events Fund is a "nonpublic forum open for a limited purpose." *DiLoreto*, 196 F.3d at 967. Nonetheless, for purposes of clarity, because the majority uses the term "limited public forum," I will use that term in my dissent as well.

Court case which the majority urges is controlling, *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, is distinguishable.

A. The Civic Events Fund is Not a Forum.

The Supreme Court has identified three types of fora: the traditional public forum, the designated public forum, and the nonpublic forum. *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 118 S. Ct. 1633, 1641, 140 L. Ed. 2d 875 (1998). As explained in *Forbes*, if governmental property is not a traditional public forum or a designated public forum, it is either a nonpublic forum or is not a forum at all. *See* 118 S. Ct. at 1641. I would find that Civic Events Fund is not a forum at all: (1) because the City's administration of the Civic Events Fund necessarily requires "editorial discretion," and (2) when "government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger*, 515 U.S. at 833.

The Court has recognized that when a government's administration of public property requires "editorial discretion," it should not be subject to review to determine if it is engaging in viewpoint discrimination. *See Forbes*, 118 S. Ct. at 1639-40; Alan E. Brownstein, *Alternative Maps for Navigating the First Amendment Maze*, 16 Const. Comment. 101, 135 (1999); *see also Finley*, 118 S. Ct. at 2184 (Scalia, J., concurring); *Fordham Univ. v. Brown*, 856 F. Supp. 684, 701-02 (D.D.C. 1994). The Supreme Court's examples of such discretionary decisions include: a university's selection of a commencement speaker, a public institution's selection of speakers for a lecture series, or a television broadcaster's programming selections. *See Forbes*, 118 S. Ct. at 1639. In *Forbes* the Court explained that these actions "by [their] nature will facilitate the expression of some viewpoints instead of others." *Id.*; *see also Chicago*

ACORN v. Metropolitan Pier and Exposition Auth., 150 F.3d 695, 701 (7th Cir. 1998) (noting that "whenever government is in the business of speech, whether it is producing television programs . . . or *making grants* . . . the exercise of editorial discretion is inescapable") (emphasis added). Consequently, simply because a government subsidy program serves some expressive purpose, government selectivity in funding private speech to further that purpose does not create a forum for First Amendment purposes. *See Finley*, 118 S. Ct. at 2183-85 (Scalia, J., concurring) (stating that the First Amendment "has no application to funding"); *Brownstein*, 16 Constit. Comment. at 134-35. Thus, forum doctrine and its prohibition against viewpoint discrimination is not applicable here.[5]

Moreover, the grant program in the present case is analogous to the grant program in *Finley*, which the Supreme Court concluded was not a limited public forum. *See* 118 S. Ct. at 2179. In *Finley*, the issue was whether the statute, requiring

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[5]Even if I were to analyze this case using forum doctrine, I would still conclude that the City's actions were constitutional, especially in light of this court's recent decision in *DiLoreto*. *See* 196 F.3d 958; *see also Good News Club v. Milford Central Sch.*, 202 F.3d 502 (2d Cir. 2000) (ruling that school's refusal to allow religious organization to use facilities was based on content, not viewpoint). In *DiLoreto*, we ruled that the school district's refusal to permit religious messages on a high school baseball field fence was a "permissible, content-based limitation on the forum, and *not* viewpoint discrimination." 196 F.3d at 969-70 (emphasis added). In addition, in *DiLoreto* we rejected the argument that excluding religion as a subject or category always constitutes viewpoint discrimination. *Id.* at 969. We stated that such an argument "mischaracterizes the holding in *Rosenberger*" and we noted that in *Rosenberger*, "[t]he Court merely held that refusing to fund only religious viewpoints on otherwise-permissible subjects (i.e. pregnancy or homosexuality) was viewpoint discrimination." *Id.* at 970.

the National Endowment for the Arts ("NEA") to consider "decency" when awarding grants, violated the First Amendment. *See id.* at 2178-79. In analyzing the NEA grant program, the Court did not apply forum doctrine. *See id.* The Court explained that such analysis was not appropriate because when the government awards NEA grants, it "does not indiscriminately 'encourage a diversity of views from private speakers.'" *Id.* at 2178 (distinguishing *Rosenberger*). Consequently, the Court noted that the subjective and competitive grant process in *Finley* was significantly different from limited public forum cases because those cases involved "comparably objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater." *Id.* (distinguishing *Rosenberger* and *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993)). Consequently, the Court concluded that the grant process in *Finley* was not a limited public forum and that the statute did not violate the First Amendment.

Like the grant process at issue in *Finley*, the City of Tucson did not create the Civic Events Fund to "indiscriminately 'encourage a diversity of views from private speakers.'" *Finley*, 118 S. Ct. at 2178 (quoting and distinguishing *Rosenberger*, 505 U.S. at 834). And similar to the program in *Finley*, the process of awarding grants in this case is not an "objective" process. *See Finley*, 118 S. Ct. at 2178 (distinguishing selective grant process in *Finley* from *Lamb's Chapel* and other cases that involved "comparably objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater"). The Subcommittee in the present case evaluates organizations' applications for funding and chooses which events to fund based on a number of factors. As noted

above, not all eligible events receive financial support from the Civic Events Fund. Accordingly, because the City did not create the Civic Events Fund to "indiscriminately 'encourage a diversity of views from private speakers,'" analysis under the forum doctrine is not appropriate. *Finley*, 118 S. Ct. at 2178.

Additionally, in concluding that the Civic Events Fund is a limited public forum, the majority disregards the critical distinction between a government's decision not to fund protected activity and the actual denial of constitutional rights. *See Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549, 76 L. Ed. 2d 129, 103 S. Ct. 1997 (1983) (the government's "decision not to subsidize the exercise of a fundamental right does not infringe on that right"); *Fordham*, 856 F. Supp. at 702. Notably, the Supreme Court has repeatedly and forcefully emphasized this distinction. *See e.g.*, *Finley*, 118 S. Ct. at 2179 (1998); *Rust v. Sullivan*, 500 U.S. at 193; *Regan*, 461 U.S. at 549; *Maher v. Roe*, 432 U.S. 464, 475, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977). As the Court recently explained in *Finley*, "although the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." 118 S. Ct. at 2179. Simply put, the government has "no obligation to fund the exercise of constitutional rights." *Tipton v. Univ. of Hawaii*, 15 F.3d 922, 926 (9th Cir. 1994). In fact, the government:

> may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, "the [g]overnment *has not*

> *discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.*"

Finley, 118 S. Ct. at 2179 (quoting *Rust*, 500 U.S. at 193) (emphasis added).

The majority does not explain why the important and "'basic difference between direct state interference with a protected activity and state encouragement of an alternative activity'" is not relevant in the present case. *Rust*, 500 U.S. at 193 (quoting *Maher*, 432 U.S. at 475). Nor does the majority explain how, in light of the Court's instruction that "[a] refusal to fund protected activity, without more, cannot be equated with a disposition of a 'penalty' on that activity," *id.*, the City has burdened Appellants' free speech rights. Consequently, I cannot conclude that simply because the City of Tucson elects to selectively fund civic events, its refusal to fund Appellants' event violated the First Amendment.

Furthermore, it is clear that the City was justified in excluding events that were in direct support of religious organizations because "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194. Events that obtain funding from the City of Tucson are advertised as having received City funding, and City employees operate light and sound equipment at these events. Additionally, during these events an announcement is made acknowledging that the City contributed to the services at the event. The majority argues that the City could have modified the policy to "decry any endorsement by the City" when such events are advertised. *Supra* at 1072. But the City should not have to engage in such a practice. The City created the Civic Events Fund and is

entitled to obtain recognition that it participates as a co-sponsor of civic events in Tucson. *See Rosenberger*, 515 U.S. at 833 ("when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wisnes") (citing *Rust*, 500 U.S. at 194).

As Justice Scalia recently noted, "[i]t is preposterous to equate the denial of taxpayer subsidy with measures 'aimed at the suppression of dangerous ideas.'" *Finley*, 118 S. Ct. at 2183 (Scalia, J., concurring) (quoting *Regan*, 461 U.S. at 550). Here, there is no evidence that the City enacted the Policy to suppress speech or a particular viewpoint. The City excluded events that directly support religious organizations only to ensure that it complied with the Establishment Clause. This exclusion was permissible and did not violate the Free Speech Clause of the First Amendment.

B. *Rosenberger* is Distinguishable.

Contrary to Appellants' argument, the Supreme Court's recent decision in *Rosenberger* does not negate the well-established precedent discussed *supra*. In *Rosenberger*, the Court found that by subsidizing publications of student organizations with money from the Student Activity Fund, the University of Virginia had intended to "open a forum for speech" and "encourage a diversity of views from private speakers." *See* 515 U.S. at 834, 837. The Court accordingly concluded that the University had created a limited public forum. *See id.* at 837. Because the University had created a limited public forum, the Court held that the University could not exclude all publications with religious editorial viewpoints from grant eligibility. *See id. Rosenberger* is distinguishable for several reasons.

First, the funding process in the present case is more akin to the grant process in *Finley* than the process used in *Rosenberger*. In *Rosenberger*, funding was available for all student organizations' publications that met the stated criteria and were "related to the educational purposes of the University," except those with religious editorial viewpoints. *Id.* at 824. Here, the City provides financial support only to the events that meet the Policy's criteria *and* that the Subcommittee determines are most deserving. Thus, the City's grant program is quite different from the objective grant process at issue in *Rosenberger*.

Second, the Court emphasized in *Rosenberger* that the case did not involve "religious organizations." *See id.* at 844. The Court noted that "if the State pays a church's bills it is subsidizing it, and we must guard against this abuse." *Id.* But the Court recognized that subsidizing a religious organization was not a "danger" in *Rosenberger* because "the student publication is not a religious institution" and "it is not a religious organization as [defined] in the University's own regulations." *Id.* In contrast, it is undisputed that Appellants' organization is a religious organization. *See* Appendix at 1, 3, 5.

Third, unlike the City in the present case which co-sponsors civic events, the University in *Rosenberger* was not promoting its own message.[6] *See Rosenberger*, 515 U.S. at 835.

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[6]This fact also distinguishes the present case from *Board of Regents of the University of Wisconsin System v. Southworth*, 146 L. Ed. 2d 193, 120 S. Ct. 1346 (2000). In *Southworth*, the Court ruled that a public university may charge its students an activity fee to fund a program to facilitate extracurricular student speech. *See id.* The Court, however, emphasized

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As the Court noted in *Rosenberger*, all publications that received funding from the Student Activity Fund printed a disclaimer declaring "that the student groups are not the University's agents, are not subject to its control, and are not its responsibility." *Id.* In contrast, as noted above, events that obtain funding from the Civic Events Fund are *advertised* as being co-sponsored by the City of Tucson. Moreover, an announcement is made at the event declaring that the event is co-sponsored by the City.

Fourth and most importantly, taxpayers did not fund the Student Activity Fund in *Rosenberger*.[7] *See* 515 U.S. at 841.

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[6](...continued)
that:

> Our decision ought not be taken to imply that in other instances the University, its agents or employees, or - of particular importance - its faculty are subject to First Amendment analysis which controls in this case. Where the University speaks, either in its own name or through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different. *The Court has not held, or suggested, that when the government speaks the rules we have discussed come into play.*

120 S. Ct. at 1357 (emphasis added) (citations omitted).

[7]Perhaps the most troubling aspect of the majority's opinion is the suggestion that the student fees in *Rosenberger* and the general tax assessments in the present case are not distinguishable, *see supra* at 1069, despite the Court's forceful language in *Rosenberger* that the case "cannot be read as addressing an expenditure from a general tax fund." 515 U.S. at 841. The majority argues that this distinction does not apply here "[g]iven that the Fund is administered by a City Council composed of duly-elected representatives of the residents of the City of Tucson to provide civic events for the benefits of the residents of the City of Tucson." *Supra* at 1069, n.10.
(continued...)

The Court in *Rosenberger* stressed this fact noting that:

> [T]he $14 paid each semester by the student is not a general tax designed to raise revenue for the University . . . . *Our decision then cannot be read as addressing an expenditure from a general tax fund.* Here, the disbursements from the fund go to private contractors for the cost of printing that which is protected under the Speech Clause of the First Amendment. That is a far cry from a general public assessment designed and effected to provide financial support for a church.

Id. at 841 (emphasis added). Justice O'Connor's concurrence in *Rosenberger* also highlighted this point, stating that "[p]ublic funds may not be used to endorse the religious message," and "*[t]hese decisions* [ ] *provide no precedent for the use of public funds to finance religious activities*." *Id.* at 847 (O'Connor, J., concurring) (emphasis added). Thus, the Court sent a very clear message in *Rosenberger* that taxpayer money may not be used to pay a religious organization's bills. Indeed, *Rosenberger* did not change this rule - it reinforced it.

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[7](...continued)
I strongly disagree. That the taxpayer funds are administered by "duly-elected officials" does not insulate this or any other case from concerns about violations of the Establishment Clause. The Establishment Clause exists, in part, to protect those in the minority, who without protection under the First Amendment, could be forced to live under a majority-imposed religious regime. *See Lee v. Weisman*, 505 U.S. 577, 592, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992) (stating that the "inspiration for the Establishment Clause" was the lesson that "in the hands of the government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce.").

III

Even assuming that the City's Policy violated the Free Speech Clause, the Policy is not unconstitutional if it serves a compelling state interest and is narrowly drawn to achieve that end. *See Widmar v. Vincent*, 454 U.S. 263, 270, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981). The City of Tucson enacted the Policy that excludes events which directly support religious organizations to avoid violating the Establishment Clause. As even the majority concedes, compliance with the Establishment Clause is a compelling state interest. *See supra* note 9 at 1066 (citing *Capitol Square Rev. and Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995) and *Lamb's Chapel*). Because City demonstrated that the Policy was necessary to avoid violating the Establishment Clause, it is constitutional.[8]

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[8]In addition to being necessary to avoid violating the Establishment Clause, the Policy is sufficiently narrow. The City's Policy did not exclude all events with any type of religious theme, it only excluded events that *directly* support religious organizations. For example, the City funded the fishing clinic for handicapped children which was sponsored by the Lutheran Church, a Mormon Battalion event that celebrated the placement of a monument in a city park which commemorated a historical event in Tucson, and a Las Posadas festival. The majority argues that the City's decision to fund the Las Posadas event demonstrates that the City is engaging in viewpoint discrimination. *See supra* at 1065. I disagree. The Las Posadas event was a play that was sponsored by a public school. Although the play told a religious story, the event did not directly support any religious organization and more importantly, the funding of that event was never challenged.

The fact that the City funded these events demonstrates that the City's Policy is not hostile towards religion. Under the funding criteria, religious

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The Establishment Clause forbids "sponsorship, financial support, and active involvement in religious activity." *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 772, 37 L. Ed. 2d 948, 93 S. Ct. 2955 (1973) (citations omitted). As a majority of the Supreme Court recognized in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989):

> this Court has come to understand the Establishment Clause to mean that government *may not promote* or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs.

Id. at 590 (footnotes omitted) (emphasis added). The Court further noted that the Establishment Clause "means at least" that "[n]o tax in any amount, large or small, can be levied to support religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.* at 591 (quoting *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 15-16, 91 L. Ed. 711, 67 S. Ct. 504 (1947)). The Court explained that, "whether the key word is

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[8](...continued)
organizations can receive funding for events so long as the event does not *directly* support the religious organization. The City could have enacted more restrictive criteria that excluded from funding all events that had any relationship with religion, direct or indirect. Instead, the City chose to adopt narrow criteria that would simply ensure that taxpayer money was not used to support religious organizations in violation of the Establishment Clause.

'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief. . . ." 492 U.S. at 593-94 (citing *Lynch v. Donnelly*, 465 U.S. 668, 687, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984)).

It is clear that if the City funded events that directly support religious organizations, the principles stated above would be violated. Appellants' event, a gathering and prayer service for "Tucson Christians," is without question, religious activity. The City may not sponsor or provide financial support for such religious activity. *See Nyquist*, 413 U.S. at 772. In addition, events that receive financial support from the Civic Events Fund are advertised as being co-sponsored by the City of Tucson. But the City may not promote or affiliate itself with any religious doctrine or organization. *See County of Allegheny*, 492 U.S. at 590. Finally, the City may not use taxpayer funds, "in any amount, large or small" to support religious activities or organizations. *Id.* at 591; *see also Rosenberger*, 515 U.S. at 840-41; *Nyquist*, 413 U.S. at 780.

The majority asserts that the City could fund events that directly support religious organizations because such conferral of incidental benefits does not violate the Establishment Clause. *See supra* at 1068-69. I agree that the conferral of incidental benefits does not necessarily implicate the Establishment Clause. However, I do not agree that the award of taxpayer funds to support a religious organization constitutes an "incidental benefit." Indeed, all of the cases cited by the majority that deal with incidental benefits are distinguishable. *See* discussion *infra*.

For example, the majority cites *Widmar v. Vincent*, 454

U.S. 263, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981). The issue in *Widmar*, however, was simply whether the University of Missouri's policy, which allowed all student groups to use its facilities, except for religious groups, was constitutional. *See id.* at 273. The Court found that the "benefits" to religion were incidental because they merely involved the use of University facilities. In contrast, here, Appellants are seeking more than mere "use" of a forum; they are seeking financial support for their event. This benefit is direct and is not "incidental" not only because taxpayers would be paying the fees owed by Appellants' organization, but also because money was collected at the event for the organization. Moreover, the Court in *Widmar* emphasized that "[t]he basis for our decision is narrow" because the University "created a forum *generally open* to student groups." *Id.* at 277. But in the present case the City of Tucson did not make the Civic Events Fund generally available to all non-religious organizations. In addition, the present case is distinguishable from *Widmar* because in that case the Court pointed out that an "open forum in a public university does not confer any imprimatur of state approval on religious sects or practices." *Id.* at 276. If the City of Tucson awarded public funds to an event designed to "organize a gathering of Tucson Christians," it would send a message that the City approved of the religious organization. Thus, it cannot be said that the "incidental benefits" involved in *Widmar* are analogous to the benefits Appellants' organization sought.

The majority also cites *Lynch v. Donnelly*, 465 U.S. 668, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984). The issue in *Lynch* was whether a city could display the creche on city property without violating the Establishment Clause. *See id.* at 685-88. The creche had been displayed on the city property for 40 or more years and was only a small portion of a larger display. *See*

id. at 671. The Supreme Court held that the display of the creche on city property did not violate the Establishment Clause because "whatever benefit to one faith or religion or to all religions [was] indirect, remote, and incidental." *Id.* at 683. Unlike the benefits sought in present case, the Court in *Lynch* noted that "[n]o expenditures for maintenance of the creche have been necessary." *Id.* at 684. In addition, the Court pointed out that *Lynch* "does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions . . . ." *Id.* at 685. In contrast, if the City in the present case were to fund Appellants' religious organization, the benefit to that organization would be neither indirect, remote, or incidental. Indeed, the "benefit" would constitute direct financial support of Appellants' organization because the City would be paying that organization's bills.[9] Thus, the benefit sought by Appellants in this case is not analogous to the incidental benefits involved in either *Lynch* or *Widmar*.

It is also clear that the City of Tucson may not fund events that directly support religious organizations under *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1975). In *Lemon*, the Supreme Court set forth three "tests" to determine whether a government practice violates the Establishment Clause. *See id.* at 612-13. "Under the *Lemon* analysis, a statute or practice which touches upon religion, if it

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[9]The majority argues that the benefit is not "direct" because the City of Tucson would not be required to make "direct" money payments to Appellants' organization. *See supra* at 1069. I disagree. As Judge Sneed stated during oral argument, such a distinction "doesn't make any sense - a concession to a particular religious organization in the form of the government spending money on their behalf as opposed to giving them the money to spend for the same cause really doesn't make any sense. In any event, an economic benefit is being made to a religious organization."

is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance not inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion." *County of Allegheny*, 492 U.S. at 592 (citing *Lemon*, 403 U.S. at 612-13). It is undisputed that the purpose of the City's Civic Events Fund is secular and that it neither advances nor inhibits religion in its principle or primary effect. However, if the City allowed events that directly support religious organizations to apply for funding, it would "foster an excessive entanglement with religion." *Id.* The City's Subcommittee, which evaluates and determines which events should receive funding, would have to pick and choose between various religious organizations, which is clearly impermissible. And the City would be serving as a co-sponsor of the religious event, providing staff at the event and financial support.

Furthermore, if the City of Tucson had funded Appellants' event, the City would have violated the endorsement test. Under the "endorsement test" the appearance of government endorsement of religious messages is unconstitutional. *See County of Allegheny*, 492 U.S. at 592-601; *Tucker v. State of California Dept. of Educ.*, 97 F.3d 1204, 1215 n.7 (9th Cir. 1996). Although Justice Scalia, writing for the majority, rejected the endorsement test in *Pinette*, five justices supported the test in that case. *See* 515 U.S. at 786, 787-88, 797-99, 817-18; *see also Tucker*, 97 F.3d at 1215 n.7; Kathleen M. Sullivan, Parades, Public Squares and Voucher Payments: Problems of Government Neutrality, 28 Conn. L. Rev. 243, 253 (1996). Under the endorsement test, "when the reasonable observer would view a government practice as endorsing religion . . . it is our duty to hold that practice invalid." *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring). Accordingly, the Establishment

Clause "impōses affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message." *Id.* (O'Connor, J., concurring). Indeed, "at the very least, [the Establishment Clause] prohibits government from appearing to take a position on questions of religious belief." *Id.* at 799 (Stevens, J., dissenting) (quoting *County of Allegheny*, 492 U.S. at 593-94).

In the present case, the Civic Events Fund excludes events that directly support religious organizations to avoid the appearance of City-endorsed religious speech. Events that receive funding are advertised as having received City funding. Even if the City were to stop advertising funded events and include a disclaimer, the appearance of endorsement would still exist.[10] Citizens of Tucson have access to information about how the City spends taxpayer funds. A reasonable individual, upon learning that the City allocated public money to subsidize an event for "Tucson Christians," would perceive that the City supports the Christian faith or religion in general. This is impermissible under the Establishment Clause. *See Pinette*, 515 U.S. at 777, 787-88, 799; *Allegheny*, 492 U.S. at 593-94; *Tucker*, 97 F.3d at 1215. Recognizing this threat, the City's funding criteria correctly excludes events that directly support religious organizations.

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[10]The majority argues that "[i]t is important, when considering how the situation of the National Day of Prayer event having costs covered by the City's Fund would be interpreted by observers, to note that most of the attendees of the event were probably adults." *See supra* note 11 at 1070. There is absolutely no support for this conclusion in the record. There is no evidence that the event was geared towards adults or that most of the attendees were adults. Thus, this argument is based on pure speculation.

If the City's Policy did not exclude events that directly support religious organizations, the City would either have to terminate the grant program entirely, or fund every religious event that requested funding. The Establishment Clause clearly prohibits government from preferring one religion over another. Thus, the City could not continue to selectively award grants to "civic events" because such subjectivity would certainly create excessive entanglement with religion in violation of the Establishment Clause. *See Lemon*, 403 U.S. at 612-13.

IV

The use of taxpayer money to pay a religious organization's bills is a blatant example of an Establishment Clause violation. *See Rosenberger*, 515 U.S. at 841, 844; *Nyquist*, 413 U.S. at 780. Even assuming that the City had adopted a totally "neutral" policy, the result would be the same - taxpayer money would still be used to pay the bills of religious organizations, which is clearly prohibited by the Establishment Clause. *See Rosenberger*, 515 U.S. at 844; *Nyquist*, 413 U.S. at 780.

As Justice O'Connor declared in *Rosenberger*, there is "no precedent for the use of public funds to finance religious activities." 515 U.S. at 847 (O'Connor, J., concurring). The majority has not pointed to a single case where the Supreme Court or this court upheld the use of *taxpayer* funds to directly support a religious organization.

The majority asserts that the City should award grants to "all speakers in the forum on a religiously neutral basis," and that such conduct would not violate the Establishment Clause. *See supra* at 1072. Clearly that is not a realistic option here. The City does not have unlimited funds to financially support civic events. Under the current policy, the City evaluates

applications and only funds those events that the Subcommittee determines will best further the City's goals. Moreover, "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions . . . and not all state policies are permissible under the Religion Clauses simply because they are neutral in form." *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring).

The City of Tucson's Civic Event Policy is constitutional. Accordingly, I would affirm the decision of the district court.

APPENDIX

To Judge Pregerson's Dissent.

[typeset version of original reproduced as appendix to Pregerson dissent; italicized material was handwritten or circled in original]

CITY OF TUCSON APPLICATION FOR CIVIC EVENT SUPPORT

Event Name: *National Day of Prayer* Date(s): *May 1, 1997*
Event Location: *Reid Park Bandshell* Hours: *6:30 - 8:30 PM*
Event Sponsor: *Tucson National Day of Prayer Committee* ** *See below*
Sponsor Status: ** ✓ non-profit organization ✓ individuals
Contact Person: *Pat Gentala City Coordinator* Phone: *749-2685*
Address: *10171 E. Rio De Oro Dr., Tucson, AZ 85749*

***This year's cosponsor required by event insurance is Tucson Association of Evangelicals*

To the best of my knowledge, the information submitted in this application is correct. If the event is authorized for City support, I agree to (1) maintain a financial accounting of the event, and provide City staff prompt access to the event financial records and other information related to the sponsoring organization, upon request; (2) pay for any City support accepted beyond that allocated by the Mayor and Council; and (3) obtain the required event permits, and liability insurance as determined by the City's Risk Manager (791-4728), and (4)

acknowledge through event advertising and an announcement during event that the City has contributed services to the event.

Signature: *Patricia E. Gentala* Date: *4/16/97*

INSTRUCTIONS FOR APPLYING FOR CIVIC EVENT SUPPORT

1. Please read "Civic Event Policy Statement and Funding Criteria" (attached) to ensure that your event meets the established criteria, and to understand how your application will be considered.
2. If you need assistance in completing this application, including identifying the City services you wish to request, contact the City's Civic Event Coordinator, Development Services Center (791-5550), or the Parks Civic Event Coordinator (791-4873).
3. Submit the completed application by one of the following methods:

Fax: 791-4973

Mail:
Civic Events
Management Research Division
City of Tucson
P.O. Box 27210
Tucson, Arizona 85726-7210

Hand Delivery:
Civic Events
Management Research Division
4th Floor, City Hall
255 W. Alameda
Tucson, Arizona

You will be notified by the Management Research Division about the Civic Event Subcommittee's recommendation for your event, and the date the Mayor and Council will consider the Subcommittee's recommendation.

REGARDLESS OF THE OUTCOME OF YOUR REQUEST FOR FEE WAIVERS THROUGH THE CIVIC EVENT FUNDING PROCESS, YOU MUST CONTACT THE DEVELOPMENT SERVICES CENTER (CIVIC EVENT COORDINATOR, 791-5550) AT LEAST 60 DAYS BEFORE THE EVENT TO OBTAIN ASSISTANCE IN COORDINATING CITY SERVICES TO THE EVENT, INCLUDING OBTAINING NECESSARY INSPECTIONS, ACQUIRING CITY PERMITS AND ARRANGING FOR FEE WAIVED OR CITY PAID SERVICES TO BE RECEIVED.

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APPLICATION OF CIVIC EVENT SUPPORT
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1. Indicate whether this application is for a first time event, annual on-going event, or one-time event, and categorize the event as historical, cultural, ethnic, fund-raiser, or other.

   First Time Event *Annual On-Going Event* One-Time Event

   Category: *Historical*

2. Explain how the event meets the evaluative criteria listed in "Civic Event Policy Statement and Evaluative Criteria," (attached). Include comments about the purpose and objectives of the event, why the event is held, how the community participates in the event, who benefits from the event, and any other relevant information. Attach an additional sheet if necessary.

Please see attached page

3. Please verify (with your initials) that the event:
   PEG Will be open to the public
   PEG Will not discriminate against patrons

4. Identify event activities (games, raffles, provision of food and alcohol) and whether there will be charges for each.

Activity	Charge (Yes/*No*)
No admission charge; No Fees; Free will offering taken at close of program	
See attached page for description of activities	

5. If you will use Parks and Recreation display booths and plan to rent the booths to others, what will you charge for the booths?

Not applicable

full double booth: $_____ single booth: $_____

10/8/92

THE NATIONAL DAY OF PRAYER
Application for Civic Event Support
Page 2, question 2

Mayor Miller has proclaimed "A Day of Prayer" in our community in coordination with the annual National Day of Prayer. His proclamation clearly states how prayer and especially the observance of a national day of prayer is part of the historical and cultural heritage of our city and nation.

The purpose of our committee is to organize an annual gathering of Tucson Christians to observe this day. We have invited the participation of over 500 Tucson area churches and Christian ministries, including many different denominations and ethnic groups. We have contacted over 25 different public officials, inviting their participation and asking for specific prayer requests. The Air Force community will be represented.

The event will be hosted by a local radio announcer. There will be a time of praise and worship led by both a youth choir and an adult choir. Pastors from nine different churches will lead the participants in prayer for local, state and national issues including the following:

- Improved relationships between different segments of our society.
- National, state and local leaders and their specific prayer requests.
- Law enforcement and emergency services.
- Youth, families, neighborhoods and the homeless.
- Educators and schools.

Patriotism will be emphasized in the decorations and music.

APPLICATION FOR CIVIC EVENT SUPPORT
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6. Please provide the following information about the event.

	Projected	Actual From Last Event Occurrence
Event Attendance:	*700-900*	*700 (1995 at Reid Park)*
Gross Revenues:	*$400. (offerrings)*	$ *393.84*
Expenses:	*$500. not counting park* *$340. park expenses*	$ *$404.54*
Net Revenues Or Fund Raised Amount	$ *<100> to be made up by donations* *plus $340. park expenses*	$ *< 10.07 >*
Amount Contributed To Beneficiary:	$ *0*	$ *0*

Please explain how any portion of net revenues not contributed to the beneficiary will be used:

Balance to be left for next year's event

7. List the other sources of event funding that you have or will apply for, and any amount you know you will receive.

Source	Amount
Donations	

8. Explain the effect upon the event should the event not receive City support or receive less support than requested, including whether the event will pay for some or all of the City services it is requesting.

It is difficult for us to afford adequate sound equipment, lighting, and rental fees which include set up and tear down time. Most fees are due before the event so offerrings taken at the close do not cover them. As much as possible, that money is reserved for next year. Without help we will have inadequate stage and sound package, as previous years did.

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APPLICATION FOR CIVIC EVENT SUPPORT
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9. Please provide the following information about the non-profit organization sponsoring the event.

Organization's Purpose: *To organize an annual gathering of Tucson Christians to observe the National Day of Prayer*

Annual budget: $ _____ Number of Employees: *0*

Organization's Funding Sources:

Source	Amount
Donations	

10. Does your organization require its members to pledge any specific religious belief?

Christian yes ✓ no _____

If yes, would a person's membership be terminated if the person would not make such a pledge?

yes ✓ no _____

11. Please complete the following affirmative action profile for your non-profit organization by providing the number of staff and board members in each category.

	Total	Female	Male	Black	Hispanic	Native American	White	Other
								Chineese
Staff		*2*	*10*	*2*	*1*		*8*	*1*
Board of Directors	*7*	*4*	*3*				*7*	

TO BE COMPLETED BY CITY STAFF
COSTS OF REQUESTED CITY SUPPORT

Parks and Recreation.....	$ _____
Solid Waste Management.....	$ _____
Police.....	$ _____
Transportation.....	$ _____
Other	$ _____
Total Costs	_____

11/18/94

APPLICATION FOR CIVIC EVENT SUPPORT - REQUEST FOR CITY SERVICES
Page -5-

Event Name: *Tucson National Day of Prayer* Sponsor: *Tucson National Day of Prayer Committee*
Event Date(s): *May 1, 1997* Hours: *6:30/8:30* Location: *Reid Park Bandshell*

Use this form to identify the City services you are requesting for your Civic Event. If you need assistance completing this form, contact the Development Services' Civic Event Coordinator (791-5550).

PARKS AND RECREATION (non-waivable deposits required for some rentals)	FY 95-96 FEE (per unit)	QUANTITY REQUESTED	TOTAL COST
Display Booth (2 booths per unit; Limit: 38 units/76 total booths; 3 days or less)			
– without electrical	$ 70	_____	$_____
– with standard electrical	$ 130	_____	$_____

Ticket Booth (3 days or less; Limit 4)

–	without electrical	$ 100	_____	$_____
–	with standard electrical	$ 120	_____	$_____

Portable Staging (3 days or less; Limit: call Parks)

–	Small Stage (16' X 16' or less)			
	without electrical	$ 145	_____	$_____
	with standard electrical	$ 205	_____	$_____
–	Large Stage (more than 16' X 16')			
	without electrical	$ 300	_____	$_____
	with standard electrical	$ 360	_____	$_____

Bleachers (1 week or less; Limit; call Parks)

–	3-Tier (50 seats)	$ 230	_____	$_____
–	8 x 15 (80 seats)	$ 230	_____	$_____
–	10-Tier (160 seats)	$ 360	_____	$_____

Kennedy Park Fiesta Puestos (built-in booths)

– Small booths (3 days or less; Limit: 9) ..... (Deposit: $60 per booth)	$ 60	_____	$ _____
– Large booth (3 days or less; Limit: 1) ..... (Deposit: $100)	$ 120	_____	$ _____

Public Address Audio Equipment

– Portable P.A. System ..... (3 days or less; Deposit: $100; Limit: 2)	$ 35	_____	$ _____
– Speakers (crate, cables) ..... (3 days or less; Deposit: $50; Limit: 4)	$ 20	_____	$ _____

– Amplifier (crate) ..... (3 days or less; Deposit: $100; Limit: 1)	$ 30	_____	$ _____
– Microphones (cables) ..... (3 days or less; Deposit: $12; Limit: 2)	$ 4	_____	$ _____
– Extension Cord (100') ..... (3 days or less; Deposit: $10; Limit: 1)	$ 2.50	_____	$ _____
Amphitheaters/Bandshells (per day; Deposit: $300)			
– Himmell Park Amphitheater	$ 10	_____	$ _____
– Bandshells (Udall/Armory/Kennedy Parks)	$ 5	_____	$ _____

– Tucson Rodeo Grounds	$ 200	_____	$ _____
Picnic Table (3 days or less Limit: 25)	$ 28	_____	$ _____
Round Serving Table (3 days or less; Limit: 9)	$ 25	_____	$ _____

5/95

APPLICATION FOR CIVIC EVENT SUPPORT - REQUEST FOR CITY SERVICES

PARKS AND RECREATION (CONT.)	FY 95-96 FEE (per unit)	QUANTITY REQUESTED	TOTAL COST
DEMEESTER OUTDOOR PERFORMANCE CENTER (Deposit $ 300)	*Set up time 2 hrs (4:30-6:30) teardown time 1 hr (till 9:30)*		
Stage Packages (Two Hour Minimum Charge)			
– Stage Package A: with normal..... lighting	$ 20 per hour	_____	$ _____
– Stage Package B: with normal lighting, some inside facilities...	$ 30 per hour	✓ *5 hrs*	$ *150.00*

– Stage Package C: with normal lighting, all inside facilities...	$ 40 per hour	_____	$ _____
Audio/Theatrical Lighting Packages (Daily Charge)	*30.00 light*		
– Audio/Theatrical Lighting A: ..... (description attached)	$ 40 per day	✓ *1*	$ *30.00*
– Audio/Theatrical Lighting B: ..... (description attached)	$ 90 per day	_____	$ _____
– Audio/Theatrical Lighting C: ..... (description attached)	$ 160 per day	✓ *1*	$ *160.00*

ADDITIONAL ELECTRICAL SERVICES

– Additional electrical outlets (per outlet)	$ 4	_____	$ _____
– Area lighting (per light pole)	$ 20	_____	$ _____

PARKS AND RECREATION TOTAL COSTS ..... $ _____

SOLID WASTE MANAGEMENT DEPARTMENT

Automated Refuse Containers (3 days or less)

– 90 Gallon	$ 22.00	_____	$ _____
– 350 Gallon	$ 52.25	_____	$ _____

Metal Refuse Containers

– Toter 5 cubic yards	$ 32.25	_____	$ _____
– Wagon 20 cubic yards.....	$ 136.00	_____	$ _____
– Roll-Off 20 cubic yards	$ 145.50	_____	$ _____
– Roll-Off 30 cubic yards	$ 181.25	_____	$ _____
– Roll-Off 40 cubic yards	$ 217.00	_____	$ _____

SOLID WASTE MANAGEMENT TOTAL COSTS ..... $ _____

OTHER DEPARTMENT SERVICES

Other City services may be requested, as long as the services are typical civic event related services. Examples of such services are street sweeping and additional electrical services. Staff will develop cost estimates for the services, based on hourly labor rates (estimated at $ 20 per hour), equipment costs (based on hourly rates for different types of vehicles and equipment), and the costs of materials used.

Service Requested	Dept	Labor (@ $20/hr)	Equipment	Materials	Total
off duty police					

5/95

AUDIO AND LIGHTING RENTAL PACKAGES FOR DEMEESTER OUTDOOR PERFORMANCE CENTER USERS

Audio and lighting charges are in addition to facility rental fees. Audio and lighting equipment is operable only by City staff (labor charges are included in the rental prices). All packages include signal processing and communications as needed.

AUDIO PACKAGES

AUDIO PACKAGE "A" @ $ 40 PER DAY

- 4-channel power mixer, 2 small speakers, and miscellaneous stands and cables as needed

AUDIO PACKAGE "B" @ $ 90 PER DAY

- 12-channel mixer, 2 medium speakers, 300-600 watts, and miscellaneous stands, direct boxes and cables as needed

AUDIO PACKAGE "C" @ $ 160 PER DAY

- 12-channel mixer, 2 large full-range speakers, 4 floor monitors, 2,500 watts, and miscellaneous stands, direct boxes and cable as needed

AUDIO PACKAGE "D" @ $ 1,400 PER DAY

- 6 JBL 4871 concert series speakers, 24-channel main mixer, floor monitors and side fills, 4,000 to 4,500 watts, and miscellaneous stands, direct boxes, and cables as needed

LIGHTING SYSTEMS

LIGHTING SYSTEM "A" @ $ 30 PER DAY

- Four 1,000 watt pars, no dimmer control

LIGHTING SYSTEM "B" @ $ 80 PER DAY

- 12 - 16 instruments pars, fresnets, allipsoids, 6 channel 2.4k, 2 scene controllers

Larger lighting systems are available, up to 32 channels at 2.4K with 101 scene controller. Priced on an individual basis.

10/8/92

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 97-17062, 97-17069

PATRICIA E. GENTALA and ROBERT A. GENTALA,
Plaintiffs-Appellants-Cross-Appellees,

v.

THE CITY OF TUCSON,
Defendant-Appellee-Cross-Appellant.

Filed August 18, 2000

ORDER

Before: HUG, Chief Judge.

Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

APPENDIX F

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Fourteenth Amendment, section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

APPENDIX G

CITY OF TUCSON
CIVIC EVENT POLICY STATEMENT
AND EVALUATION CRITERIA

Policy

The Mayor and Council encourage and support Civic Events that:

- Celebrate and commemorate the historical, cultural and ethnic heritage of the City and the nation, or increase the community's knowledge and understanding of critical issues, with the purpose of improving citizens' quality of life;
- generate broad community appeal and participation;
- instill civic pride in the City, state, or nation;
- contribute to tourism; or
- are identified as unique community events.

In support of this policy, and within the evaluation criteria described below, the Mayor and Council annually authorize the provision of various City services to Civic Events, at no charge.

The Civic Events Subcommittee, composed of Council Members appointed by the Mayor, shall evaluate requests for support submitted by individuals and organizations supporting Civic Events, and recommend to the Mayor and Council allocations of support to these Civic Events. The Mayor and Council will make final determinations during the City's annual budget process of the level of support each event will receive.

Civic Event allocations are a budgetary means of detailing the costs City departments incur providing in-kind support to Civic Events. City support provided through the Civic Event process

will not involve cash payments to events, or to contractors necessary to provide a requested service.

While encouraging existing and first time events to apply for Civic Event support, the Mayor and Council believes that events should eventually become self-reliant. To encourage events to become self-reliant, City support provided in subsequent years may be gradually reduced.

Conditions of Receiving City Support

The following conditions must be met before an event may be considered for City support through the Civic Event process.

1. Events must be sponsored by non-profit organizations, or by individuals conducting the events on a non-profit basis (with fund-raising proceeds used for a community benefit). However, the following types of events are not eligible for Civic Event support:

   a. events sponsored by organizations that receive City funding through the Outside Agency process;

   b. events sponsored by organizations that use City property on a rent-waived ($1/yr) basis; and

   c. events held in direct support of religious organizations.

2. All events must be open to the public and must not discriminate against patrons in any manner.

3. Event sponsors agree to:

   a. Maintain a financial accounting of the event, and upon request provide City staff prompt access to such financial records and any additional financial information about the sponsoring organization.

b. Obtain liability insurance for their event, in the amounts determined by the City's Risk Manager (791-4728).

c. Contact Development Services (Civic Event Coordinator, 791-5550) at least 60 days before the event to obtain assistance in coordinating the event, including obtaining the appropriate inspections, acquiring the necessary permits, and coordinating any City services to be received.

City Services Available Through The Civic Event Funding Process

In-kind City services provided through the Civic Event Funding Process will be limited to typical event-related services (e.g., Parks event equipment, refuse containers, street sweeping). Non-typical services (e.g., transportation of event materials, on-site City staff to conduct parking lot control or other miscellaneous duties) will not be provided to events.

The provision of Police Department support will be limited to events that have historically received in-kind Police services. New requests for in-kind police services will not be considered. For events allocated Police support in addition to other City services, the Police support (including traffic control barricades) will be funded before any other requested City services, in instances when the approved allocation is less than requested by the event.

Rental fees for Tucson Convention Center (TCC) facilities are not eligible for waivers through the Civic Event Funding Process, as the TCC already has reduced rental rates for non-profit organizations.

Application Process

Event sponsors shall submit applications for support in conjunction with the City's annual budget process, for events to be held during the next fiscal year. The deadline for submission is included on the application form.

Depending upon the availability of funds, the City may consider applications for support which are submitted after the City's budget process has concluded. Applications for support from such events must be received no later than 60 days before the event is to occur.

All requests for support, from either on-going or first time events, must be made prior to the event. Requests for support received after the event has occurred will not be considered.

Evaluation criteria

The Civic Events Committee will apply the following guidelines to the information provided by event sponsors in their application for City support (attached).

Purpose and Objectives: The extent to which the event celebrates and commemorates the community's cultural and ethnic composition, or significant ethnic, cultural and historical national or local occurrences; or improves understanding and awareness of issues facing the community with the objective of improving the quality of life. As additional funds are available, other types of events will be considered for support, but sponsors of such events must demonstrate, through a description of the event and its goals and objectives, that the event is worthy of City support.

Community Interest: The extent to which the event generates broad community appeal and participation. The scope of

community appeal and participation will be determined by the projected event attendance (or actual attendance at the event's last occurrence), in comparison to similar information from other events requesting City support. However, special consideration will also be given to small first time events conducted by organizations with limited resources that are in special need of assistance in their initial efforts to establish an event.

Need For Support: The extent to which the event sponsor demonstrates a need for the City support. Consideration will be given to whether the organization can pay for some or all of the City services it is requesting (as demonstrated within the application for support). Preference will be given to events that do not have admission or other charges. Among the items considered will be the costs of the City support requested, admission or other charges, net revenues, and fund-raising goals. The Subcommittee may request additional financial information about the sponsoring organization.

Other Sources Of Support: The extent to which an event has explored and obtained other sources of support (in addition to the City Civic Event support requested) including private and public support. This is particularly important when the event appears eligible for other types of City support, such as through the Tucson Pima Arts Council for art related projects, and the Tucson Partnership for downtown events.

10/8/92

Supreme Court, U.S.
FILED
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No. 01-75

In The

Supreme Court of the United States

PATRICIA E. GENTALA and ROBERT A. GENTALA,

Petitioners,

v.

THE CITY OF TUCSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the en banc panel of the court of appeals correctly determined that the Establishment Clause of the First Amendment prohibits the City of Tucson from providing a municipal subsidy from its tax-generated Civic Events Fund and public employees to provide stage, lighting, sound, and other special-event services for a religious organization's sectarian prayer service held in the bandshell of a public park, where such services are not routinely provided to other park users, and where the City requires Civic Events Fund recipients to identify the City as a contributor in all event advertising.

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JURISDICTION

On July 25, 2001, Chief Deputy Clerk Francis Lorson extended the deadline for filing a response to the petition for a writ of certiorari until August 27, 2001.

CONSTITUTIONAL PROVISIONS AND ORDINANCES

The text of article II, section 12 and article IX, section 10 of the Arizona Constitution are set forth in Appendix 1. Relevant Tucson code ordinances are set forth in Appendices 2-6.

STATEMENT OF THE CASE

Facts

1. Respondent City of Tucson ("City") owns municipal parks that are open and available to the public for a wide range of uses. Pet. 2. Should, however, "civic, social, religious, charitable, commercial or other users" wish to use City equipment, such as display booths, bleachers, or staging, the Tucson Code establishes mandatory fees for such use. T.C. §21-14; App. 2. Similar mandatory fees are required for use of other non-basic City services like bandshells and lighting packages. T.C. §21-16(4); App. 5. The fees set forth in both T.C. §21-14 and §21-16(4) are mandatory and may not be waived. ER, 17-1, ¶7.[1] These

[1] "ER" refers to the Excerpts of Record filed with the court of appeals.

fees apply to all City parks users who wish to use City equipment at their events.

2. To encourage and support a limited number of civic events it believes celebrate the City's heritage, increase knowledge and understanding of issues that improve citizens' quality of life, generate community appeal and participation, contribute to tourism, or are otherwise identified as unique community events,[2] the City administers a discretionary municipal subsidy program through its Civic Events Fund ("Fund"). The Fund consists of public moneys appropriated by the City on an annual basis from its general coffers and is derived from tax revenues and user fees, among other sources. ER, 17-3, at ¶¶4, 6. The Fund is legislatively appropriated on an annual basis solely for subsidizing civic events that the City's Mayor and Council believe meet its Civic Event Policy criteria. The Fund cannot be used for non-civic event purposes, and eligible civic events cannot receive funding once the appropriated Fund monies have been exhausted in a given fiscal year. *Id.* at ¶7.

Contrary to Petitioners' factual recitation, civic event funding is not available to every City park user. Pet. 3. Rather, to be eligible to receive a City subsidy, an event must be classified as a civic event, and meet one of the stated purposes contained in the Civic Event Policy. Pet. App. 162a-166a. A civic event must also meet a number of additional conditions to be eligible for funding. The civic event must (1) be sponsored by a non-profit organization or by individuals conducting the event on a non-profit

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[2] Complete criteria are set forth in the City's Civic Event Policy Statement and Evaluation Criteria, ("Civic Event Policy"). Pet. App. 162a.

basis "with all fund-raising proceeds used for a community benefit;" (2) be open to the public and cannot discriminate against persons in any manner; and (3) maintain liability insurance and a financial accounting of the event, and acquire necessary permits from the City. *Id.* at 163a-164a.[3] Lastly, the City requires all civic events it funds to "acknowledge through event advertising and an announcement at the event that the City has contributed services to the event." Pet. App. 135a-136a.

The Civic Event Policy lists three types of events that are ineligible to receive civic event support:[4]

a. Events sponsored by organizations that receive City funding through the Outside Agency process;

b. Events sponsored by organizations that use City property on a rent-waived ($1/yr) basis; and

c. Events held in direct support of religious organizations.

Pet. App. 163a.

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[3] Petitioners' Complaint alleged that the liability insurance requirement was a prior restraint on speech and that the financial accounting requirements constituted "excessive government entanglement with religion in violation of the Establishment Clause." ER 1 at p. 9.

[4] Although not specifically enumerated in the Civic Events Policy, counsel for the City explained that other events are likewise excluded from receiving civic events funding (e.g., political fundraisers and rallies). Transcript of Hearing on Motion for Preliminary Injunction [Prel. Inj. Tr.] at 36, 38 (D. Ariz. Aug. 8, 1997). Thus, not only is civic event funding not available to all park users, but it is also not available to all nonprofit organizations.

The City does not automatically award grants to all eligible civic events. Rather, once the Subcommittee of the Mayor and Council determines that an event is "eligible" for funding, it applies the "Evaluation Criteria," to determine whether the event is one that the City should support, and in what amount. Pet. App. 162, 165a. These evaluation criteria include: (1) the purpose and objectives of the event; (2) the extent to which the event generates broad community appeal and participation; (3) the event's need for support; and (4) the event's ability to obtain financial support from other public and private sources.

The Subcommittee or the Mayor and Council may choose, and have chosen, not to fund "eligible" events. ER 17-3 at ¶17.[5] Events containing religious subject matter or viewpoint may be, and have been, funded where there is no direct benefit to a particular religious organization. ER 17-3, exhibits 4-6. Thus, Petitioners' contention that the City "categorically denies" civic event funding for "events with a religious message" (Pet. 2) is incorrect. The civic event policy denies City subsidies for events held in direct support of a religious organization. Pet. App. 163a. The policy does not preclude religious speech or expression per se from receiving a subsidy. ER 17-3, exhibits 4-6. Events not raising funds for a religious organization have been granted subsidies despite being

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[5] In fiscal year 1992-93, the Mayor and Council declined to support the Tucson Residence Foundation Greased Pig Contest. ER 7-C at p. 2. In 1995, the City did not fund the Humane Society Fun Day, the Sister Cities Fund Raiser, and the Casa Car Show. ER 7-B, pp. 2-3.

sponsored by a religious organization, because no direct benefit flowed to the organization.[6] In contrast, the City has denied civic event subsidies where the subject matter of the event, such as a carnival or bazaar, may have little or no religious content, but the direct beneficiary of the event was a religious organization.[7]

With the exception of the approximately two dozen civic events granted subsidies by the City each year,[8] all other events, nonprofit or otherwise, desiring to use the bandshell and its lighting and audio system are required to pay fees, as provided in the Tucson Code. ER 17-1 at ¶¶4-7, and Apps. 4-6. In the case of events granted subsidies, the bill for such equipment and services, expenses that would normally be paid by an event sponsor, are instead charged to, and paid by, the Fund. ER 17-3, ¶7. In

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[6] For example, the City has subsidized a fishing clinic for disabled children sponsored by the Aid Association for Lutherans, a Mormon Battalion event celebrating the placement of a monument in a city park which commemorated a Tucson historical event, and a Las Posadas pageant, reenacting the events surrounding the birth of Jesus which was sponsored by the Tucson Festival Society and a local public school. ER 17-3, exhibits 4-6.

[7] In fiscal years 1991-92 and 1992-93, the City declined to support several fundraisers for Christian schools, including the San Xavier Mission School's pageant celebrating "the heritage of the Old Pueblo," the Santa Cruz Church and school's "Fiesta de Familia," the St. John the Evangelist School's annual Fiesta, and the St. Peter & Paul School's "Fun Days." ER 17-3, exhibits 1-3.

[8] The court of appeals found that in 1995, the only year for which there is complete information in the record, 23 of 26 groups received funding. Pet. App. 9a.

all instances, however, the required fees are paid, either by the organization using the equipment and services, or by the City itself.

4. Petitioners, on behalf of the Tucson National Day of Prayer Committee ("Prayer Committee"), applied to the City for civic event support seeking stage, audio, and lighting services at the City's Demeester Outdoor Performance Center at Reid Park, for an event called the National Day of Prayer. Pet. App. 135a. Co-sponsor of the event was the Tucson Association of Evangelicals, a religious organization. *Ibid.*

The Prayer Committee's application described the event as an "annual gathering of Tucson Christians" for praise and worship, with "[p]astors from nine different churches [leading] the participants in prayer for local, state, and national issues . . . ." Pet. App. 141a. The application stated that there would be no admission charge, but acknowledged that a "free will offering" would be conducted at the close of the program, and that "[a]s much as possible," the balance would be "reserved for next year's event." Pet. App. 142a-144a.

After reviewing the application, both the City's Civic Event Subcommittee and the Mayor and Council denied civic event funding for the Prayer Committee's event citing separation of church and state issues, and concluding that the event was one held in "direct support of a religious organization."[9] ER 7-G, 7-I, 7-J.

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[9] The City has always maintained that the Prayer Committee's event is "a religious event, involving religious expression and directly supporting religious groups." Pet. App. 60a.

The Prayer Committee's event was held. Pet. 8. "As planned, and ultimately carried out, the National Day of Prayer Event consisted of a few songs followed by prayer led by nine pastors from different churches [and] was attended by several hundred persons." Petitioners' Complaint, ER 1 at 6.

Proceedings Below

5. Following denial of civic event funding, petitioners brought this suit in the United States District Court for the District of Arizona, alleging, *inter alia*, that the City's Civic Event Policy is unconstitutional on its face and as applied in violation of the First Amendment's Free Speech Clause, Establishment Clause, and Free Exercise Clause. Pet. App. 55a.[10]

At the preliminary injunction hearing, petitioners moved to consolidate the hearing with the trial on the merits. Pet. App. 56a. Over the City's objection, the district court granted petitioners' motion to consolidate.[11]

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[10] Petitioners also alleged a violation of the Religious Freedom and Restoration Act of 1993, 42 U.S.C. §§2000bb-1-4; however, based on this Court's decision in *City of Boerne v. P.F. Flores*, 521 U.S. 507 (1997) holding the statute unconstitutional, the court did not consider this claim. This issue is not on appeal.

[11] During the course of the proceedings, the City sought to amend its answer to add state law defenses. Article II, §12 of the Arizona Constitution provides in part: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." Article IX, §10 states: "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service

Pet. App. 79a. Next, the district court denied petitioners' motions for preliminary and permanent injunctive relief, concluding that the City's actions did not violate petitioners' free speech rights and that funding the Prayer Committee's activities would have violated the Establishment Clause, and dismissed the action. Pet. App. 77a.

6. Both parties appealed the district court's respective adverse rulings. Pet. App. 83a.

a. On appeal, a divided panel of the Ninth Circuit reversed. Pet. App. 80a-109a. While the two-judge majority acknowledged that "the idea of the government subsidizing a public prayer service raises obvious Establishment Clause concerns," (*id.* at 107a) it nevertheless concluded that petitioners' Free Speech rights outweighed this concern. The two-judge majority reasoned that "even if the City's reimbursement of costs for the National Day of Prayer event provided some support for theism over its opposite, or for Christianity over competing world views," the amount of support in this case "was neither substantial nor direct enough" to violate the prohibition on advancement of religion under the Establishment Clause. *Id.* at 98a.

b. Judge Pregerson dissented. Pet. App. 109a-133a. Judge Pregerson found, *inter alia*, that the City was promoting its own message through its Civic Event Policy and thus did not violate petitioners' Free Speech or Free Exercise rights, and that in any event, awarding taxpayer

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corporation." Both provisions are set forth in their entirety in App. 1. The district court denied the City's motion to amend its answer. App. 7.

funds, not generally available to all non-religious organizations, would amount to unconstitutional direct financial support of petitioners' religious organization. *Ibid.*

7. Thereafter the Ninth Circuit granted the City's request for rehearing en banc. Pet. App. 160a.

a. An en banc panel of the court of appeals withdrew the earlier panel decision and affirmed the district court's order. *Gentala v. City of Tucson*, 244 F.3d 1065 (9th Cir. 2001), Pet. App. 1a.

The en banc court applied this Court's decision in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), and the Court's post-*Rosenberger* cases to the facts and found that the City through its "Civic Event Fund Policy Statement and Evaluation Criteria" is "affirmatively promoting certain events as city-endorsed and approved." *Id.* at 35a (fn20).

The court of appeals then concluded that the public funding and government endorsement considerations considerably overwhelmed the neutrality consideration, and thus held that the City's Establishment Clause justification for the religious exclusion was valid.[12]

b. Judge Fernandez dissented. Pet. App. 37a-45a. In his opinion, the City's Civic Event Policy violated the Free Exercise Clause of the first amendment. Nonetheless, he explicitly found that the City's policy did not violate Petitioners' Free Speech rights because in his view "the

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[12] Because the court found the City's actions were justified under the Establishment Clause, it did not find it necessary to address whether the City should have been granted leave to add additional affirmative defenses derived from the Arizona Constitution's religion clauses. *Id.* at 37a.

case is not about speech, viewpoints, or speakers." *Id.* at 37a.

c. Judge Wardlaw joined Judge Kleinfeld in a separate dissent. Pet. App. 45a-50a. In their opinion, the record was not sufficiently developed to permit resolution of the First Amendment issues. *Ibid.* Rather than echoing Judge Fernandez's view, however, they posited that if the City's policy were as represented (and found by the majority) then subsidizing petitioners would violate the Establishment Clause:

> The first possibility is that the City is selective, routinely denying the waiver to events or groups it feels do not "celebrate and commemorate the historical, cultural and ethnic heritage of the City" or do not "instill civic pride." If so, the waiver program would not be a public forum at all. Instead, it would be like the grant program in *Finley* – discretionary government funding subject to selective criteria. In that case the city could properly exclude religious organizations from the waiver program, regardless of whether the waivers would violate the Establishment Clause, simply because the religious nature of the events did not promote the city's message of inclusion. And granting a waiver to [petitioners] under these facts would likely violate the Establishment Clause.

Id. at 49a.

REASONS FOR DENYING THE WRIT

The court of appeals correctly applied the longstanding principles firmly established by this Court for

addressing First Amendment cases. There is no conflict with this Court's precedents or the decisions of other circuits. Further review is therefore unwarranted.

I. THIS COURT'S DECISION IN *GOOD NEWS CLUB* DID NOT INVOLVE ISSUES OF GOVERNMENT FUNDING OR ENDORSEMENT; THEREFORE IT DOES NOT REQUIRE A DIFFERENT RESULT IN THE DECISION BELOW.

Petitioners err in contending (Pet. 18) that Court's recent plurality decision in *Good News Club v. Milford Central School*, 533 U.S. ___, 121 S.Ct. 2093 (2001), "mandates reversal" of the en banc panel's decision. *Good News Club* involved none of the government funding, speech and endorsement issues present here.

In *Good News Club* this Court found that a public school's refusal to permit after-hours meetings on its property by a Christian children's club violated the club's free speech rights, where "the school facilities are being used for a nonschool function and there is no government sponsorship of the Club's activities." *Id.*, 121 S.Ct. at 2100. The Court did not address the Establishment Clause issue, concluding that under the facts presented, the school had no valid Establishment Clause interest. *Ibid.*

In marked contrast, here the City is engaged in a government function through its Mayor and Council's review, selection, and subsidization of certain limited civic events it believes espouse the City's Civic Event Policy. In addition, the City's subsidization of a civic event, coupled with the advertising requirements, reflects City endorsement of the event.

Given these fact differences, the plurality opinion in *Good News Club* affects neither the analysis, nor ultimate holding in the court of appeals' decision below. Therefore, no review by this Court is necessary.[13]

II. THE DECISION BELOW FOLLOWS THIS COURT'S FIRST AMENDMENT PRECEDENTS.

Petitioners similarly err in contending (Pet. 18) that the decision below conflicts with this Court's prior First Amendment rulings. This Court has never held that the government, when acting in a communicative manner as it is here, may use taxpayer dollars to selectively subsidize religious organizations engaging in religious worship activity.

A. Free Speech

Petitioners erroneously claim *Widmar v. Vincent*, 454 U.S. 263 (1981), *Rosenberger*, and *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), are dispositive in addressing the Free Speech issue. Pet. 18-19. None of those cases involved the issues here of selective government funding in a limited or nonpublic forum. Petitioners ignore the numerous Free Speech cases that are applicable here – those where the government itself is engaged in communicative expression.

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[13] Should the Court disagree, and determine that the issues warrant further review, the City believes its state law defenses are relevant to such an inquiry and should be permitted. *See, Witters v. State Com'n for the Blind*, 771 P.2d 1119 (Wash. 1989), *cert. denied*, 493 U.S. 850. In any event, these issues should not be disposed of without additional briefing and argument.

First, where the government is acting in a communicative manner, as it is here, it does not matter whether the City's policy is considered to discriminate on the basis of content or viewpoint. As this Court recently reiterated in *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 121 S.Ct 1043 (2001) even viewpoint discrimination is permissible in such circumstances.

> [v]iewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, *see Board of Regents of Univ. of Wis. System v. Southworth*, [citation omitted], or instances, like *Rust*, in which the government "used private speakers to transmit information pertaining to its own program." [citing *Rosenberger*]. . . . The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Board of Regents of Univ. of Wis. System v. Southworth, supra*, at 235, 120 S.Ct. 1346.

Id., 121 S.Ct. at 1048.

In a discretionary subsidy program such as the City's, which limits funding eligibility to events that meet certain criteria, the City will necessarily have inquired into the content of the event, religious or not.

Further, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program," *Rust v. Sullivan*, 500 U.S. at 194.

Accordingly, where as here the City "speaks" through its Civic Event Policy, the City can define parameters, including, limiting or prohibiting funding to events held in "direct support of religious organizations," especially given the significant Establishment Clause issues involved. The decision below simply applies these well-established principles.

B. Free Exercise

Petitioners mistakenly contend (Pet. 19-20) that the court below applied an inappropriate test in evaluating their facial challenge to the Civic Event Policy. Petitioners are wrong. The test applied by the court was as follows: "in considering a facial challenge to the policy, we study the words themselves and the City's "authoritative constructions" of them through "its own implementation and interpretation" of the policy. Pet. App. at 14a, fn.9, *citing Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 131 (1992). To succeed on a facial challenge, petitioners "must establish that *no* set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Further, this Court has instructed that the proper inquiry in analyzing Free Exercise claims is "whether government has placed a substantial burden on the observation of a central belief or practice," *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). The court of appeals made this inquiry and concluded that the City's Civic Event Policy does not substantially burden petitioners' Free Exercise rights.

In support of their claim, Petitioners erroneously rely (Pet. 20) on *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), a case that is both factually and legally distinguishable. *Lukumi* involved regulatory ordinances prohibiting a religious practice and the record indicated that "suppression of the central element of the Santeria worship service was the object of the ordinances." *Id.* at 543.

Here, by contrast, the City is not prohibiting petitioners from engaging in any religious practice, nor are they precluded from using stage, audio, lighting or other City equipment for their events. The City is simply saying that if petitioners wish to use City equipment for events that directly support religious organizations, then they must pay the same fees as virtually every other park user. There is no interference with petitioners' Free Exercise rights.

This Court has repeatedly recognized that the "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right," *Rust*, 500 U.S. at 193 (*quoting Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983)). *See also, Rust*, 500 U.S. at 193 ("A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity."); *accord Harris v. McRae*, 448 U.S. 297, 317 n. 19 (1980).

The court of appeals made the appropriate inquiry and concluded that the City's Civic Event Policy does not substantially burden petitioners' Free Exercise rights. Pet. App. 36a.

C. Establishment Clause

In a discretionary subsidy program such as the City's, which awards funding to limited events that meet certain specified criteria, the City will necessarily have to inquire into the content of the event, religious or not. Consequently, petitioners' reliance on neutrality alone, is misplaced. Neutrality is but one factor to review. *See, Mitchell v. Helms*, 530 U.S. 793, 120 S.Ct. 2530, 2578-81 (2000). The City is neutral toward religion. It funds religious speech that meets its criteria as long as it does not directly support a religious organization. Neutrality alone, however, is not enough.

As correctly noted by the court of appeals, the prohibition on government funding of religious activities has long been of central importance to this Court's Establishment Clause jurisprudence. Pet. App. at 24a. *Id.* at 21a-23a. Thus, the court of appeals was appropriately concerned here about the direct use of tax dollars to fund a religious organization's religious activity.

Further, this Court has cautioned, that there is a crucial distinction between government speech endorsing religion, which the Establishment Clause prohibits, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 765 (1995). The distinction, however, disappears when private speech can be mistaken for that of the government. *Id.* at 766. – That is precisely what the court determined here.

Petitioners dismiss the notion that a reasonable observer would mistake the idea that subsidizing their event could appear as endorsement. But, the court of

appeals correctly found, the City's Civic Events Fund "is *meant* to endorse some events as 'Civic Events' worthy of the City's imprimatur." Pet. App. 31a. The limited events that receive civic event funding are required to advertise the event (both ahead of time and at the function) as having received City funding. Even if the City were to stop advertising funded events and include a disclaimer, the appearance of endorsement would still exist because these are limited events that receive funding. As the court below recognized, this raises two different concerns – a funding concern, and the endorsement concern, both of which stand independently of neutrality. Pet. App. at 24a, fn. 16.

III. THE COURT Of APPEALS CORRECTLY DISTINGUISHED *ROSENBERGER*.

Petitioners chastise the court below for distinguishing the numerous factual differences between this case and *Rosenberger*. Pet. 22-27. However, this Court has instructed that Establishment Clause analyses are determined by the facts of a given case.

> Whether a government activity violates the Establishment Clause is "in large part a legal question to be answered on the basis of judicial interpretation of social facts. . . . Every government practice must be judged in its unique circumstances. . . . "

Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 120 S.Ct. at 2282 (2000).

Those differences are significant, and when viewed together, mandate the result reached by the court below:

(1) the City's affirmative identification of itself as the sponsor; (2) the Prayer Committee's status as a religious organization; (3) the use of tax dollars to in essence "pay a church's bills" for a religious event; (4) the lack of private independent choice in determining the funding, i.e., the City selectively chooses which events will receive funding; (5) the City's endorsement of certain civic events; and (6) the advertising requirement for civic event funding recipients.

Accordingly, the court of appeals appropriately distinguished *Rosenberger*.

IV. THE DECISION BELOW IS IN ACCORD WITH DECISIONS FROM OTHER COURTS OF APPEAL.

Petitioners mischaracterize the nature of the services subsidized by the City and then reach back twenty-one years to the decision in *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979), in an attempt to create an artificial split in the circuits. *O'Hair* is factually distinguishable. In *O'Hair*, a group of individuals sought to enjoin a celebration of the Mass by Pope John Paul II on the National Mall. *Id.* at 933. The group also sought to enjoin the Interior Department from providing the event with free crowd and traffic control and other services. The D.C. Court upheld the Interior Department's provision because it was merely providing the same services as "were regularly incurred with any large public gathering."[14] *Ibid.* But here, Civic Event equipment and services

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[14] In his concurrence, Judge MacKinnon also noted in addressing the Establishment Clause concerns, that the

are not routinely granted free of charge to all non-religious users.

More relevant to this case was the court's recitation that the Washington Archdiocese would expend in excess of $400,000 to cover "construction of the platform," the expense of "sound equipment, electrical facilities (including supplemental electric current), portable toilets, first aid stations, chairs, and other physical facilities," and that "after the gathering, it will pay for the removal of all the facilities constructed for the event and for the cleanup." *Id.* at 933. Many, if not most, of these are the very types of items petitioners were asking the City to subsidize. It is the very desire for a City subsidy that is the Establishment Clause issue here, one that was not present in *O'Hair*.

Petitioners seek payment of fees for services and equipment not routinely included with park use, for an event required to advertise the City as a sponsor, and at which fundraising activities were to occur. Thus, *O'Hair* does not conflict with the decision below and no further review is warranted.

V. PETITIONERS' SPECULATIVE FEARS DO NOT WARRANT REVIEW.

Lastly, petitioners speculate about how the decision below creates "a device for evading and nullifying the

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National Park regulations under which the permit was issued included the express condition that "no fee may be collected," or "donations solicited" at the event, conditions not present here. *Id.* at 937.

equal access rights of religious speakers by establishing fees and then waiving them for virtually all but religious users. Pet. 29. Such a view is a twisted and distorted holding of the decision below. It is petitioners' incorrect attempt to characterize the benefit as one available to all, that then allows them to raise such hypothetical fears. The present case does not establish that the City waives fees for virtually all other park users. Further, there is no suggestion in the record that the City had a pernicious reason for enacting its policy. In the unlikely event that such a case were to arise, the Court would have before it a specific, concrete factual record to address petitioners' concerns; however, that is not present here. Petitioners' speculative fears do not warrant further review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: August 27, 2001

CONSTITUTION OF THE STATE OF ARIZONA ARTICLE II. DECLARATION OF RIGHTS

§ 12. Liberty of conscience; appropriations for religious purposes prohibited; religious freedom

Section 12. The liberty of conscience secured by the provisions of this Constitution shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the State. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned touching his religious belief in any court of justice to affect the weight of his testimony.

Ariz. Const. art. II, § 12

CONSTITUTION OF THE STATE OF ARIZONA ARTICLE IX. PUBLIC DEBT, REVENUE, AND TAXATION

§ 10. Aid of church, private or sectarian school, or public service corporation

Section 10. No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.

Ariz. Const. art. IX, § 10

Sec. 21-14. Same – Use of equipment.

Sec. 21-14(1). The fees for use of event equipment by civic, social, religious, charitable, commercial or other users, for an initial minimum rental period (specified below) shall be as follows:

(1)	*Double display booth unit (2 booths per unit)*	
	a. Without electrical	$ 70.00
	b. With standard electrical	130.00
(2)	*Bleacher*	
	a. 5-tier	$230.00
	b. 8 x 15	230.00
	c. 10-tier	360.00
(3)	*Picnic table*	$ 28.00
(4)	*Portable staging*	
	a. Small (up to 16' x 16') without electrical	$145.00
	b. Small (up to 16' x 16') with standard electrical	205.00
	c. Large (over 16' x 16') without electrical	300.00
	d. Large (over 16' x 16') with standard electrical	360.00
(5)	*Ticket booth*	
	a. Without electrical	$100.00
	b. With standard electrical	120.00
(6)	*Kennedy Park Puesto (permanent concession booth)*	
	a. Small Puesto	$ 60.00
	b. Large Puesto	120.00
(7)	*Food serving table*	$ 25.00
(8)	*Barbecue pits*	
	a. Small	$ 40.00
	b. Large	90.00

(9) *Additional electrical services*

a. Standard electrical outlets (per outlet)	$ 4.00
b. Standard area lighting (per light pole)	20.00

Other electrical services as requested will be charged on a one hundred (100) percent cost recovery basis for labor and material.

The above fees shall be for an initial minimum period as follows:

a. Bleachers: one (1) week

b. Barbecue pits: one (1) day

c. All other equipment: three (3) days

If equipment is to be used longer than the initial rental period (above), additional fees will be charged. The additional use fees will be twenty (20) percent of the original fee for each additional similar time period that the equipment is used.

Sec. 21-16. Same – Use of certain meeting rooms; reservation fee for ramadas, sport fields, volley ball courts, bandshells, outdoor performance center, Estevan boxing gym, rodeo grounds, and fees for special maintenance.

Sec. 21-16(1). The fee for use of meeting rooms at any city recreation center shall be as follows:

Daytime, on weekdays (8:00 a.m. to 6:00 p.m.), per hour	$ 4.50
Evenings, on weekdays (6:00 p.m. to 10:00 p.m.), per hour	9.50

Saturdays, Sundays and holidays (8:00 a.m. to 10:00 p.m.), per hour	9.50

Sec. 21-16(2). The fees for reservation and use of any ramadas, rodeo grounds and Estevan Boxing Gym shall be as follows:

(1)	Ramada	$ 7.00
(2)	Rodeo grounds (daily):	
	For-profit, individual and public entities	400.00
	For nonprofit groups (501(c)(3)) and schools	200.00
(3)	Estevan Boxing Gym:	
	Professionals:	
	Monthly	20.00
	Weekly	8.00
	Daily	2.00
	Amateurs	No Charge

Sec. 21-16(3). The following fees shall be charged for use of sports field, volleyball courts and in-line skating rink:

(1)	*Organized tournament use:*	
	Volleyball courts; daily, per court:	
	For-profit, individuals and private entities	$ 70.00
	For nonprofit groups (501(c)(3))	15.00
	Sports fields, daily, per field:	
	For-profit, individuals and private entities	120.00
	For nonprofit group (501(c)(3))	35.00
	In-line skating rink tournament/special event/clinic rate:	
	For-profit, individuals and private entities	$ 60.00
	For nonprofit group (501(c)(3))	15.00

(2) *Other uses.*

Volleyball courts:	
Day (3 hours)	7.00
Night (2 hours)	9.00
Sports fields:	
Day (3 hours)	7.00
Night (2 hours)	12.00
In-line skating rink	
Day (3 hours) (8:00 a.m. – 6:00 p.m.)	7.00
Night (2 hours) (6:00 p.m. – 8:00 p.m. or 8:00 p.m. – 10:00 p.m.)	9.00

Sec. 21-16(4). There shall be a fee for use of a bandshell of seventy-five dollars ($75.00) per day. There shall be a fee for use of the Himmel Park Amphitheater area of ten dollars ($10.00) per day. Bandshells and amphitheaters may be reserved in advance upon payment of the fee. The following fees shall be charged for the hourly use of the Outdoor Performance Center:

Stage only, with lights; 2-hour minimum	$20.00
Stage and inside facilities; 2-hour minimum	30.00
Stage and inside facilities and green room, 2-hour minimum	40.00

Sec. 21-16(5). The users of any park facility referred to in this chapter may request special maintenance of any athletic facility referred to in this chapter. The request shall be in writing at least twenty-four (24) hours prior to the requested special maintenance. In writing, the department shall advise the party requesting special maintenance, at the time the request is made, the cost of providing the special maintenance. The cost shall be an

estimate of the actual cost to the city of providing a service, and shall be paid for in advance.

Sec. 21-16(6). The rental fee for each concession stand at sports fields shall be sixty dollars ($60.00) per event, not to exceed three (3) days. If the event for which the stand is rented exceeds three (3) days, an additional pro rata fee shall be charged per additional day.

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(CIVIL MINUTES – GENERAL)

Case No. CV 97-327 Date: August 11, 1997

Title: GENTALA vs CITY OF TUCSON

HONORABLE FRANK R. ZAPATA

Proceedings: [ ] Open Court
[X] Chambers [ ] Other

Defendant City of Tucson moves to amend its answer to add as a defense certain arguments based on the fact that the "requirements of the Arizona Constitution are stricter than its federal counterpart and may provide for additional grounds for disposal of this case." While it is true that federal courts generally avoid making decisions of Constitutional law where there are other grounds to base a decision, the defense offered by the City does not provide such grounds. A state cannot reduce the rights guaranteed by the Bill of Rights to all citizens, although it may enlarge them in its own constitution and jurisprudence. *See PruneYard Shopping Center v. Robins,* 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980) (Supreme Court upheld state court decision interpreting the state constitution to protect the distribution of pamphlets and petitions at a privately owned shopping center).

IT IS ORDERED that the Defendant, City of Tucson's Motion to Amend Answer is **DENIED.**

/s/ Frank R. Zapata
FRANK R. ZAPATA
United States District Court Judge

Supreme Court, U.S.
FILED
SEP 12 2001
OFFICE OF THE CLERK

(3)

No. 01-75

IN THE

Supreme Court of the United States

PATRICIA E. GENTALA AND ROBERT A. GENTALA,

Petitioners,

vs.

THE CITY OF TUCSON,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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Constitutional provisions

U.S. Const. amend. I ..... 1, *passim*

ARGUMENT

The respondent City of Tucson authorizes the provision, free of charge,[1] of basic city services -- lighting, trash collection, use of facilities like bandshells and stage equipment, etc. -- to a wide range of nonprofit organizations holding events in public parks. The city, however, categorically denies free in-kind services -- and instead requires payment of fees -- for events with messages reflecting a religious viewpoint. The en banc Ninth Circuit held that the Establishment Clause of the First Amendment *requires* this discriminatory policy. This holding plainly conflicts with this Court's equal access jurisprudence, most notably *Good News Club v. Milford Central School*, 121 S. Ct. 2093 (2001), and *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). Pet. §§ I-III, V. Moreover, the Ninth Circuit's decision creates a split in the circuits. Pet. § IV.

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[1]The city asserts that its fees for city services "are mandatory and may not be waived." Opp. at 1. This assertion is at best semantics, and at worst a misrepresentation. It is undisputed that what actually happens is that the city sets fees for various services, but when an event sponsor's application under the Civic Event Policy is approved, the relevant fees are charged off against the city's own Civic Event Fund account -- i.e., the city pays itself, and the event sponsor is not charged. *See* Pet. at 3; Opp. at 5; 244 F.3d at 1069 (Ninth Circuit's explanation of process); Pet. App. 162a (city's own policy describing charge-off as "a budgetary means of detailing the costs City departments incur providing in-kind support to Civic Events"). This provision of services "at no charge," Pet. App. 162a (Civic Event Policy), may fairly be characterized as a waiver of fees. Indeed, the city itself describes the provision of in-kind services under the policy as "fee waivers through the Civic Event funding process," Pet. App. 137a (application form). *See also* Pet. App. 164a (city policy excepts fees for only one facility from eligibility for rental fee "waivers through the Civic Event Funding Process").

Petitioners Patricia and Robert Gentala do not claim automatic entitlement to free city services for their National Day of Prayer event. Rather, the Gentalas seek only to be afforded the same treatment as is given to sponsors of events with secular viewpoints. The Gentalas challenge the constitutionality of the city's automatic disqualification of private speech *because of its religious viewpoint*.

I. Conflict with *Good News Club*

The Gentalas' petition for certiorari identifies several distinct ways in which this Court's *Good News Club* decision repudiates the legal analysis the Ninth Circuit employed in the present case. Pet. § I. In its opposition to certiorari, the city does not -- because it cannot -- contest a single one of these points. Instead, the city

- erroneously labels the *Good News Club* majority a mere "plurality," Opp. at 11, 12;

- incorrectly claims that the *Good News Club* decision "did not address the Establishment Clause issue," Opp. at 11; *compare Good News Club*, 121 S. Ct. at 2103-07 (addressing Establishment Clause issue); and,

- invokes insignificant "*fact* differences" between *Good News Club* and the present case to deflect the *legal* analysis of *Good News Club*, Opp. at 12 (emphasis added).[2]

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[2]Contrary to the city, this case unquestionably fits squarely into this Court's line of "equal access" precedents. Even the court below recognized

(continued...)

Respondent cannot reconcile the Ninth Circuit's decision here with *Good News Club*. Moreover, in *Good News Club* this Court expressly identified the Ninth Circuit's decision below as falling on the wrong side of a circuit split, *see Good News Club*, 121 S. Ct. at 2099.

II. Conflict with *Rosenberger*

The Ninth Circuit, recognizing *Rosenberger* as "quite similar" to the present case, 244 F.3d at 1074, nevertheless labored heavily to distinguish *Rosenberger*. 244 F.3d at 1074-81. As demonstrated in the petition for certiorari, however, each of the Ninth Circuit's purported grounds of distinction crumples under analysis. Pet. § III(A).

Tellingly, the respondent city makes no more than a token effort to defend the Ninth Circuit's treatment of *Rosenberger*. Opp. at 17-18. Indeed, the city offers no legal analysis beyond a regurgitated list of the Ninth Circuit's supposed grounds for distinction. *Id.* While it is true that every Establishment Clause case rests on its unique facts, *id.* at 17, it is incumbent upon the city -- which bears the burden of supporting its affirmative defense under the Establishment Clause -- to explain *why* the

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[2](...continued)
that this Court's equal access decision in *Rosenberger* was the most pertinent precedent. *See* 244 F.3d at 1074-81. Both *Rosenberger* and *Good News Club* apply the same constitutional forum analysis to viewpoint-based religious exclusions. *See Rosenberger*, 515 U.S. at 828-46; *Good News Club*, 121 S. Ct. at 2099-2107. Thus, the *Good News Club* ruling directly bears on the legal analysis in the present case.

inevitable differences in factual details should be legally dispositive here. The city fails to do so.

III. Mischaracterization of the Civic Event Program

The city repeatedly attempts to portray its provision of free city services under the Civic Event Policy as highly limited and exclusive. *See* Opp. at 2, 3 n.4, 4-5, 15, 17, 19-20. The record is to the contrary.

The Gentalas requested city services under the Civic Event Policy in fiscal year 1996-97. Pet. at 6. For the 1995-96 fiscal year, the city's Civic Events Subcommittee had recommended approval of 23 out of 26 applications. *See* Pet. at 5; Opp. at 5 n.8. The city, which bears the evidentiary burden of supporting its affirmative defense under the Establishment Clause, proffered no evidence that this was not a representative year. Indeed, the record evidence regarding the previous fiscal year lists twenty-four approved applications, but only one rejected application, *see* Mem. from City Manager re: Recommended Civic Event Allocations of FY 1995-96 Support (Oct. 9, 1995) (Attachments A and B indicating, *inter alia*, levels of '94-'95 funding) [attached as Ex. B to Decl. of Patricia E. Gentala in Support of Plaintiffs' Motion for a Preliminary Injunction].

The city claims that, aside from the two dozen or so events approved for free city services each year, all other groups must pay for such services. But the city submitted no evidence either to support this proposition or to demonstrate its constitutional significance. *Cf. Good News Club*, 121 S. Ct. at 2107 n.9 (whether many groups or few avail themselves of a limited public forum is irrelevant to the permissibility, under the

Establishment Clause, of allowing groups with religious viewpoints to participate). What the record *does* show is that the city gave its approval to the overwhelming majority of applicants. Pet. at 5 (23 of 26 events approved). *Cf. Rosenberger*, 515 U.S. at 825 (118 of 135 applicants approved for funding). Faced with this fact, the city resorts to speculation outside the record. Such speculation falls far short of an affirmative defense that could justify discrimination against religious viewpoints.

IV. Split in the Circuits

The D.C. Circuit, in *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979), held that the Establishment Clause does *not* forbid government from providing, on a religion-neutral basis, free city services for a religious event in a public park. The en banc Ninth Circuit in the case below held precisely the opposite, namely, that the Establishment Clause *does* forbid free city services for religious events, no matter how neutral the government program. *See* 244 F.3d at 1073 n.12 (Establishment Clause requires exclusion of events with religious messages "even if the exclusion is viewpoint discriminatory"). The city points out that some of the specific city services in question in *O'Hair* were different, Opp. at 19, but this detail has no constitutional significance. *Compare* Pet. at 7 (Gentalas requested use of bandshell stage and sound and lighting equipment) *with O'Hair*, 613 F.2d at 933 (government supplied police for crowd and traffic control, portable water fountains, and some electric current). The city also claims that in the present case, city services are not routinely granted to all non-religious users. Opp. at 19. But the record reflects that

virtually every nonprofit group that requested Civic Event services was approved. *See supra* § III.

V. Additional Defects in the City's Analysis

The respondent city defends its policy of excluding religious speech on two rather inconsistent grounds: first, that the policy is *not* viewpoint-discriminatory; and second, that the policy is *allowed* to be viewpoint-discriminatory because the policy addresses only government speech. Neither contention is supportable.

A. The city engages in viewpoint discrimination

The city denies that it categorically excludes religious messages from its program of free in-kind city services. Opp. at 5-6 & n.6. But the city's denial is plainly incorrect.

First, the Civic Event Policy by its terms categorically excludes "events held in direct support of religious organizations." Pet. App. 163a. The city construes this exclusion to cover two kinds of events: fundraisers benefitting religious organizations (i.e., events giving direct *financial* support to religious organizations), and events with religious messages (i.e., events with a *message* in "direct support" of religious organizations). Transcript of Hearing on Motion for Preliminary Injunction [Prel. Inj. Tr.] at 42-43 (D. Ariz. Aug. 8, 1997) (counsel for City of Tucson explaining meaning of religious exclusion).[3]

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[3]The fundraiser exclusion is not pertinent here. Pet. at 8 n.6, 25-26. Nor has the city defended its exclusion of the Gentalas on that basis. Here, it

(continued...)

Second, the city itself admitted that it denied the Gentalas' application because of the event's "religious message," Prel. Inj. Tr. at 43.

Third, the city identified no other basis for excluding the Gentalas' planned National Day of Prayer rally from consideration for in-kind city services under the Civic Event Policy. The courts below all recognized that it was the religious character of the event that prompted the city's denial. Pet. App. 59a-60a (district court); 213 F.3d at 1063 (original Ninth Circuit panel). Indeed, the en banc Ninth Circuit concluded that it was precisely the religious character of the event that *required* its exclusion from the program of free city services, even if that denial was deemed viewpoint-discriminatory. 244 F.3d at 1073 n.12, 1078, 1082.

Fourth, the city's invocation of the record is not to the contrary. The city repeatedly cites to "ER 17-3, exhibits 4-6," Opp. at 4-5 & n.6, as supposedly demonstrating that the city, contrary to its stated basis for denying the Gentalas' application for free city services, actually does allow free services for events with religious messages. The record reference is to three approved events: a fishing clinic for disabled children sponsored by a Lutheran organization; a dedication of a monument commemorating a Mormon Battalion; and the Las Posadas pageant. Opp. at 5 n.6. The fishing clinic had no apparent message at all (other than teaching fishing), much less

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[3](...continued)
was the Gentalas' planned *speech* that would supposedly be in "direct support of religious organizations." *See also* Opp. at 16 (claiming that the city would willingly "fund[] religious speech that . . . does not directly support a religious organization").

a religious message. ER 17-3, Ex. 4. The dedication of the war monument was proposed as a cultural and historical event. ER 17-3, Ex. 5. And the city's Civic Events Subcommittee recommended approval of Las Posadas -- a reenactment of the search of Mary and Joseph for lodging in Bethlehem prior to the birth of Jesus -- "because the Subcommittee concluded that the event is art," ER 7, Ex. C (Civic Events Subcommittee Memorandum of July 6, 1992). *See also* 213 F.3d at 1065.

In none of these three instances did the city purport to approve an event presenting a message with a religious perspective.[4] Indeed, the city argued to the contrary. *See* Defendant's Mem. of Law in Opp. to Plaintiffs' Motion for Preliminary Injunction at 18-20 (explaining away Las Posadas as "cultural, historical and ethnic," the Mormon Battalion Monument as "historic," and the Lutheran fishing event as a "fishing clinic," each of which entailed no more than a "merely incidental" benefit to any religious organization).

In any event, for the city to argue that religious messages are *not* categorically excluded would be for the city to undercut the very basis for excluding the Gentalas. *See* Pet. at 7-8.

In sum, it cannot be credibly denied that the city excluded the Gentalas from consideration for free in-kind city services *because the event featured a message with a religious perspective*. As the city's Civic Event Subcommittee chairman put it, "We're not gonna get into prayer stuff." Verbatim

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[4]These three events do illustrate, however, some of the entanglement problems created by a policy of religious exclusion, which requires city officials to judge what is and is not "religious," *see* Pet. at 21-22.

Transcript of Civic Event Subcommittee Meeting re: "National Day of Prayer" (Apr. 21, 1997) [ER 7-G].

B. The city encourages private speech, not government speech

The city claims that it may discriminate against particular viewpoints with impunity, Opp. at 13, because the provision of free in-kind city services converts private events into government speech, *id.* at 12-14. This contention is meritless. A government program to "encourage" private speakers, Pet. App. at 162a (Civic Event Policy), nevertheless must adhere to the constitutional norm of viewpoint neutrality. *Rosenberger*, 515 U.S. at 833 (distinguishing government speech from "a program to encourage private speakers"); *Board of Regents of Univ. of Wisconsin v. Southworth*, 529 U.S. 217 (2000) (viewpoint neutrality test governs university funding program to encourage private speakers). The city does not purport to control the content of speech at the Earthday Festival, Gay Pride Picnic, St. Patrick's Day Parade and Festival, or other events receiving in-kind city services under the Civic Event Policy. The present case simply does not fit the "government speech" paradigm.

C. The city's other arguments fail

Two of the city's other contentions merit no more that a brief reply.

The city claims that a valid Free Exercise claim requires a showing that the government burdened a "central belief or practice" of religion. Opp. at 14 (quoting *Hernandez v.*

Commissioner, 490 U.S. 680, 699 (1989)). But this Court expressly rejected the "centrality" test in *Employment Division v. Smith*, 494 U.S. 872, 886-87 (1990). Furthermore, the city's policy is *explicitly discriminatory against religion*, placing that policy in a category of government action particularly noxious to the Constitution. *See* Pet. § II(B).

The city claims that state law requires it to discriminate against the Gentalas' religious message. Opp. at 7 n.11, 12 n.13. This *state* law defense clearly cannot justify violation of the Gentalas' *federal* constitutional rights. *Good News Club*, 121 S. Ct. at 2100 n.2. In any event, this state law affirmative defense is not even before this Court. The district court disallowed the city's motion to amend its answer to add that defense, Appendix to Brief in Opposition at 7, and on the city's cross-appeal, the original Ninth Circuit panel affirmed, 213 F.3d at 1071. The en banc Ninth Circuit declined to reach the issue. 244 F.3d at 1082. The city has not filed a cross-petition for certiorari, and hence the propriety of the state law defense is not presented here.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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September 11, 2001